83 - 1801

No.

Supreme Court of the United States

October Term, 1983

ANTHONY LIBERATORE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. WHETHER RACKETEERING ACTIVITY AS DEFINED IN 18 UNITED STATES CODE §1961 (1) AND (5) CAN BE ESTABLISHED WHEN THE GOVERNMENT RELIES UPON TWO OR MORE VIOLATIONS OF STATE STATUTORY LAW AND SAID STATE STATUTORY SCHEME PROHIBITS PROSECUTION AND PUNISHMENT FOR BOTH CRIMES CHARGED.

2. WHETHER THE TRIAL COURT AND THE COURT OF APPEALS MISAPPLIED THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY TO A RICO PROSECUTION WHERE CONVICTIONS OF PREDICATE ACTS WERE PREVIOUSLY OBTAINED AT A SEPARATE TRIAL ON SEPARATE COUNTS CHARGING THE SAME PREDICATE ACTS AS SUBSTANTIVE CRIMES.

3. WHETHER USE OF EVIDENCE BY STATE AUTHORITIES IN A STATE PROSECUTION, GATHERED AND PRESENTED PRIMARILY BY FEDERAL LAW ENFORCEMENT AUTHORITIES, ESTABLISHED JEOPARDY AND BARRED FURTHER FEDERAL PROSECUTION FOR THE SAME ALLEGED CRIMINAL ACTIVITIES.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Other Petitioners:

James T. Licavoli
United States Supreme Court
Case No. 83-

John P. Calandra
United States Supreme Court
Case No. 83-1573

Pasquale Cisternino
United States Supreme Court
Case No. 83-

Ronald Carabbia
United States Supreme Court
Case No. 83-

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The Petitioner, Anthony Liberatore, respectfully asks that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 9, 1984.

OPINION BELOW

The original Opinion of he Sixth Circuit Court of Appeals in *United States v. James T. Licavoli, et al.*, Case Numbers 82-3498, 82-3509, 82-3510, 82-3511, 82-3512, 82-3513 and 82-3606, is appended hereto at p. A1. The Opinion below relating to Petitioner was in Case Numbers 82-3509 and 82-3606 and was filed on January 9, 1984. Said judgment became final on March 5 1984, the date when Petitioner's application for rehearing was denied (Appendix A64).

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming Petitioner's conviction was filed on January 9, 1984. A motion for rehearing was denied on March 5, 1984. The jurisdiction of this Court is being invoked pursuant to Title 28 United States Code, Section 1254(1), which provides for review by Writ of Certiorari of all cases decided by the Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides as follows:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATUTORY PROVISIONS INVOLVED

18 United States Code 1961(1) and (5).

18 United States Code 1962(d).

18 United States Code 371.

18 United States Code 201(b)(3).

See Appendix A65.

JUDICIAL HISTORY OF THE CASE

This is a Petition for Certiorari to review the judgment of conviction of the Petitioner, Anthony Liberatore, in the United States District Court for the Northern District of Ohio, Eastern Division. The Petitioner and others were charged in a four count indictment alleging violations of 18 U.S.C. Section 1962, Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. 371, Conspiracy and 18 U.S.C. 201(b)(3), Bribery (Appendix A65). Counts II, III and IV, Conspiracy and Bribery, were tried first, Count I, RICO, having been severed by the trial court pending decision by the Sixth Circuit Court of Appeals in *United States v. Sutton*, 642 F.2d 1001 (1980). The Petitioner was acquitted of Bribery, charged in Count III and convicted of Conspiracy and Bribery charged in Counts II and IV.

Count I was tried in a jury trial beginning April 1, 1982. The Petitioner was found guilty on July 8, 1982. On July 30, 1982, the Petitioner was sentenced to serve a term of incarceration of fourteen years concurrent with the sentences imposed on Counts II and IV.

The Petitioner subsequently appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed his conviction on Count I, RICO (Appendix A1). From that judgment affirming his conviction, the Petitioner now seeks review of his conviction on certiorari to this Court.

STATEMENT OF THE CASE

On October 6, 1977, Daniel Greene was killed by a bomb in the parking lot of Brainard Place in Lyndhurst, Ohio. An intensive investigation by local and federal authorities ensued which resulted in indictments in December of 1977 charging, among other offenses, aggravated murder in the Court of Common Pleas of Cuyahoga County, Ohio against James Licavoli aka Jack White, Angelo Lonardo, Thomas Sinito, Ronald Carabbia, Pasquale Cisternino aka Butchie, and James Fratianno. These indictments were based upon information given to authorities by one Raymond Ferritto.

Ferritto testified in Common Pleas Court that in approximately May of 1976 he was summoned to Warren, Ohio by James Fratianno to discuss problems Anthony Delsanter was having with John Nardi and Danny Greene in Cleveland, Ohio.[1] According to Ferritto's state trial testimony, Delsanter met with him on a second trip to Warren, Ohio and initiated the plan to murder Greene to eliminate his interference in gambling in the Cleveland area. Several other meetings were held both in Warren and Cleveland in tracking Greene in an attempt to kill him. During these meetings various people allegedly joined Ferritto in the planning of and stalking of Greene, including Jack White, Butchie Cisternino and Ronald Carabbia. The plan to kill Greene, according to Ferritto, continued until he was eventually killed at Brainard Place on October 6, 1977.

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1. The testimony of Raymond Ferritto was read to the federal jury after he was found to be an unavailable witness pursuant to Federal Rule of Evidence 804. The testimony read was from three separate trials in the Court of Common Pleas, Cuyahoga County, Ohio.

During the time of the first state trial, Louis Aratari and Gary Percio were arrested in Middleburg Heights, a suburb of Cleveland, Ohio. Their automobile contained weapons and Aratari, already on parole, became a government witness. Aratari claimed that he had been hired by Thomas Lanci, a clothing salesman, upon orders of the Petitioner, Anthony Liberatore, to assist in the killing of Greene. Aratari claimed to have been originally hired to kill the "Irish crew" consisting of Greene's partners, Keith Ritson, Kevin McTaggart and Brian O'Donnell. Subsequently, Aratari brought in Ronald Guiles aka Renaldo Giuliani, a fellow inmate in Ohio prisons, to help him stalk the "Irish crew." Aratari then claims to have been also put on trail of Greene and to murder him or to assist in his murder. Kenneth Ciarcia, Lanci's uncle, provided automobiles to Aratari and Guiles to use. Aratari and Guiles claimed to have gone to the scene of the Greene murder as a back-up team, prepared to shoot Greene with a rifle, if possible. At that point, Ferritto, in the company of Carabbia—not Cisternino—ordered Aratari and Guiles to leave when they failed to see Greene when he arrived in the Brainard Place parking lot.

Although Ferritto first claimed that Cisternino had been with him when Greene was killed, after the arrest of Aratari and Guiles, Ferritto changed his testimony to remove Cisternino from the automobile and placed Carabbia there as the party who detonated the bomb which killed Greene. Ferritto now claimed Cisternino had helped construct the bomb used to kill Greene.

As to the Petitioner, Ferritto's recited testimony revealed that codefendant Calandra had told Ferritto that two individuals, who purportedly worked for the Petitioner, could be used in ". . . this Greene thing." Ferritto later met Aratari, who eventually introduced Guiles to him. Aratari claimed to have worked for the Petitioner.

A stipulation was then entered into the record establishing that if the balance of the testimony of Ferritto from this third trial was read to the jury, the Petitioner's name would not appear.

However, the cross-examination of Ferritto read to the jury revealed several exculpatory facts: at no time had Ferritto ever met or spoken with the Petitioner; of all the many people at the Delsanter funeral, the Petitioner was not present; the Petitioner was not present at the October 4, 1977 meeting in which one last attempt to kill Greene was discussed; that neither Aratari nor Guiles did anything in the killing of Greene; that contrary to the testimony of Aratari and Guiles, they never got into Ferritto's car at Brainard Place, they were never told that the bomb car had been placed at Brainard Place the previous night, that no test or "dry run" was performed the day before the murder, on October 5, 1977; that Ferritto, in two statements, one to the FBI and one to the federal grand jury, never mentioned Aratari or Guiles as being on the scene at Brainard Place; that Ferritto never mentioned Aratari and Guiles because they had never done anything toward the killing of Greene; and, contrary to the purported enlistment of Aratari and Guiles at a wedding on September 24, 1977 to kill Greene, Ferritto testified that he first met them prior to September 10, 1977.[2]

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2. During the first state trial, everyone was acquitted except Cisternino and Carabbia. Calandra, due to health problems, was granted a separate trial.

Based upon the claims of Aratari and Guiles, an indictment was returned against the Petitioner, Lanci and Ciarcia. Trial proceeded in the Court of Common Pleas against Lanci, Ciarcia and Calandra (joined from the first indictment). Calandra was acquitted, Lanci and Ciarcia were convicted of aggravated murder.

(Continued on following page)

The Petitioner, Anthony Liberatore, offered several witnesses in his behalf. The Petitioner called Brian O'Donnell himself who testified that Danny Greene introduced Liberatore to him as a good friend and that he, O'Donnell, was not involved in criminal activity with Danny Greene as Aratari had claimed. Further, O'Donnell testified that he was quite visible and available on a routine basis at all times Aratari and Guiles claimed they sought him out on the west side of Cleveland to kill him, but could not find him. O'Donnell also contradicted Aratari as to a meeting between Greene and the Petitioner as to time, the parties present, and subject of the meeting (to help Ritson's father find a job).

The son of Danny Greene, Danny Kelly, also testified that Liberatore and his father were friends and that his father and Liberatore often met.

Victor Lungaro was called on behalf of codefendant Ciarcia. Lungaro owned the Arthur Murray Dance Studio where Aratari and Guiles claimed they obtained a rifle to help kill Greene if they should find him. Lungaro testified, as did Lanci,[3] that he never provided a weapon to Aratari nor Guiles and only sighted a rifle for Lanci, which he returned to him.

Footnote continued—

The Petitioner was tried on the state indictment for aggravated murder and aggravated arson. The trial began on September 29, 1980. After a six week trial, the Petitioner was acquitted of aggravated arson and a mistrial was declared on the charge of aggravated murder because of a hung jury. The Ohio Supreme Court on March 9, 1983 ruled that the double jeopardy clause of the Fifth Amendment to the United States Constitution barred retrial of the Petitioner on the charge of aggravated murder in the Court of Common Pleas. See *State v. Liberatore*, 4 Ohio St. 3d 13 (1983).

3. Lanci became a government witness following exhaustion of remedies on appeal of his State murder conviction but prior to the federal RICO trial.

REASONS FOR GRANTING PETITIONER A WRIT OF CERTIORARI

1. THIS CASE PROVIDES THE COURT WITH AN OPPORTUNITY TO DEFINE THE LIMITATIONS PLACED UPON FEDERAL PROSECUTIONS BY STATE LEGISLATURES WHERE FEDERAL AUTHORITIES USE STATE CRIMES AS PREDICATE ACTS IN SUPPORT OF A PROSECUTION FOR VIOLATION OF 18 U.S.C. 1962.

2. THIS CASE PROVIDES THE COURT WITH ITS FIRST OPPORTUNITY TO INTERPRET CONGRESSIONAL INTENT AND LIMITATIONS IN THE USE OF STATE CRIMES AS PREDICATE ACTS IN SUPPORT OF A PROSECUTION FOR VIOLATION OF 18 U.S.C. 1962, THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT.

3. THE DECISION OF THE COURT OF APPEALS OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE COURTS OF APPEALS OF THE THIRD AND FIFTH CIRCUITS.

4. THIS CASE PROVIDES A UNIQUE LEGAL QUESTION INVOLVING THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WHERE PREDICATE CRIMES UNDER 18 U.S.C. 1961(1) AND (5) AND 1962(d) WERE PREVIOUSLY TRIED AS SEPARATE COUNTS OF THE SAME INDICTMENT.

5. THIS CASE PROVIDES THE COURT WITH AN OPPORTUNITY TO ESTABLISH AND DEFINE WHAT CONSTITUTES A BAD FAITH FEDERAL PROSECUTION FOR FIFTH AMENDMENT DOUBLE JEOPARDY PURPOSES WHERE A PRIOR STATE PROSECUTION WAS BASED ENTIRELY ON THE EFFORTS AND SUPPORT OF FEDERAL AUTHORITIES.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER TWO VIOLATIONS OF STATE LAW TO ESTABLISH A RICO VIOLATION WHEN THE STATE STATUTORY SCHEME SPECIFICALLY PROHIBITS PROSECUTION AND PUNISHMENT FOR BOTH CRIMES CHARGED.

Under Ohio law the state is forbidden from obtaining a conviction for both conspiracy to commit murder and murder. Ohio Revised Code §2923.01 provides in pertinent part:

> *(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.* (emphasis added).

The Ohio legislature has thus adopted the Wharton rule which recognizes the merger of conspiracy into the completed crime and has rejected the Pinkerton rule, *Pinkerton v. United States*, 328 U.S. 640 (1946).[4]

Congress did not specifically contemplate the Ohio statutory scheme when it enacted the RICO statutes in 1970. The provisions in the proposed original bills providing that a predicate act could be ". . . any conspiracy to commit any of the foregoing offenses" was deleted from the final version. See Senate Bill 1623, March 20, 1969, and Senate Bill 1869 of April 19, 1969, Corrupt Organi-

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4. Prior to 1974 Ohio did not have a crime of conspiracy. However, conspiracy was recognized as a vehicle to inculpate certain offenders as an evidentiary matter. See *Doty v. State*, 94 Ohio St. 258 (1916).

zations Act of 1969. Deputy Attorney General Richard Kleindienst, on August 11, 1969, suggested a revision of the Senate bills so as to narrow the definition of "racketeering activity." Specifically, Mr. Kleindienst felt the act as proposed, ". . . would result in a large number of unintended applications as well as tending towards a complete federalization of criminal justice." By these words Mr. Kleindienst recognized the need to allow individual states continued authority to define and proscribe offenses and the need to further avoid ". . . unintended applications . . ." of the proposed RICO law. The Congress adopted, in substance, the views of the Department of Justice. Hence, a clear mandate was established to limit the predicate acts to those which the various states had intended as crimes. There is no inference the Senate intended to include conspiracy acts in the final version, and by its omission, the intent of Congress is clear—to not include state conspiracy crimes within §1961(1)(A).

The generic meaning of "murder" is controlling. "Murder", Ohio Revised Code §2923.01 et seq., relates to or describes its entire group or class, and "murder" does not always contemplate a conspiracy to complete its unlawful act. Taking the trial court's analysis of generic meaning of "murder," the Petitioner submits that murder is descriptive of its entire group or class. That group or class of crimes is more broadly designated as "homicides." The Ohio statutory scheme clearly divides the classifications of crimes under Title 29 into thirteen separate sections, each with its own defined and prohibited unlawful activities. Homicides are grouped into Ohio Revised Code Ch. 2903; conspiracy, attempt and complicity are grouped into Ohio Revised Code Ch. 2923. The Ohio Revised Code specified those crimes which it is unlawful to conspire to commit. Hence, under Ohio law, conspiracy is codified as a separate and distinct crime which merges

into the completed crime upon conviction for its commission. Murder in Ohio is not conspiracy. Conspiracy in Ohio is not murder. The merger of conspiracy into the completed crime upon conviction not only prohibits multiple sentences, but also prohibits multiple convictions in accord with the principle of Wharton's rule of merger. Otherwise, the Ohio General Assembly would have allowed for multiple convictions and permitted multiple sentences. Unlike other states in which conspiracy is a common law offense, Ohio has, by its statutory scheme, defined the limits of prosecution for conspiracy. Congress does not have the authority to expand the boundaries of statutory crimes in Ohio, said power lying entirely within the authority of the Ohio General Assembly.

Additionally, it should be noted that Congress specifically employed the singular form of the words "act" and "threat" when defining those crimes which, under state law, are predicate acts. The Petitioner submits that since a singular "act" or "threat" involving the enumerated crimes was specified in 18 United States Code §1961, Congress intended to make each separate violation of an enumerated state crime itself one crime and proof of the same to be supported by evidence of each "act" or "threat." Nowhere do the words appear in that statute which would give life to an interpretation that each "act" or "threat" underlying a specific crime was itself to be a crime. Just as a single conspiracy cannot be separated by the government into separate prosecutions for each act under the conspiracy, the government should not be allowed to separate acts which lead up to a specified predicate act so as to establish two or more predicate acts under §1961. See *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1971).

Finally, Congress is not unlimited in its assimilative use of state criminal statutes to defined federal crimes.

United States v. Frumento, 563 F.2d 1083 (3rd Cir. 1976), held:

> The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, *is defined as a matter of legislative draftsmanship by reference to state law crimes.* At 1087 (emphasis added).

In accord are *United States v. Forsythe*, 560 F.2d 1127, 1135 (3rd Cir. 1977): ". . . RICO incorporates the elements of those state offenses for definitional purposes;" *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981): "The predicate acts are in turn proscribed by existing enumerated state or federal laws."

The expansive use of state criminal statutes must therefore give the government not only a broader range of offenses to prosecute, but also define the limits of their use. It should be noted that §1961(1)(A) clearly includes "racketeering activity" under state law or ". . . any threat or act involving . . . [the enumerated crimes] *which is chargeable* under State law *and punishable* by imprisonment for more than one year." (Emphasis added). Hence, punishment is a requisite to predicate act status under §1961(1)(A).

As noted previously, Ohio Revised Code §2923.01(G) *prohibits* not only conviction for conspiracy to murder when a murder conviction is obtained, but it follows that a sentence can not be imposed in such a situation. Without a conviction there can be no sentence and without sentence, the predicate act of conspiracy in conjunction with the substantive predicate act of murder, fails to qualify as a predicate crime under §1961(1)(A).

II. THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS THE INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY WHERE THE PREDICATE ACTS HAD BEEN PREVIOUSLY TRIED AS SEPARATE COUNTS AND THE PRIOR STATE PROSECUTIONS WERE, IN REALITY, THE RESULT OF AN INVESTIGATION BY FEDERAL LAW ENFORCEMENT AUTHORITIES.

Prior to trial the Petitioner moved the district court to dismiss the predicate acts of bribery specified in Count I, RICO, on grounds of double jeopardy and collateral estoppel. In support of the requested dismissal, the Petitioner noted in his motion that: (1) he was previously tried in 1980 on Counts II through IV alleging conspiracy and bribery; (2) The bribery charges, Counts III and IV, were alleged in the RICO charge, Count I, as predicate acts in paragraphs 8(d) and (e); (3) The Petitioner neither requested nor caused the separate trial of the RICO charge, Count I; and (4) The Petitioner was acquitted of Count III, bribery, and found guilty and sentenced on Counts II and IV, conspiracy to bribe and bribery.

The district court granted the Petitioner's motion to dismiss the predicate act of bribery charged in paragraph 8(d) of Count I. The district court dismissed this predicate act under the doctrine of collateral estoppel. However, the district court overruled the Petitioner's motion to dismiss as to the predicate act charged in paragraph 8(e) of Count I and also overruled the Petitioner's motion to dismiss on the grounds that the previous state proceedings were, in reality, a federal prosecution and a federal trial was barred by the Double Jeopardy clause of the Fifth Amendment (Appendix A38).

A

The Fifth Amendment to the United States Constitution provides that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." This fundamental constitutional principle prohibits putting a criminal defendant on trial more than once for the same crime. *United States v. Bell*, 163 U.S. 662 (1896), and applies whether a defendant is previously convicted or acquitted of the crime charged. *Brown v. Ohio*, 432 U.S. 161 (1977); *United States v. Scott*, 437 U.S. 82 (1978); *United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Wilson*, 420 U.S. 332 (1975); *United States v. Brooklier*, 632 F.2d 620 (9th Cir. 1981); and *United States v. Ford*, 603 F.2d 1043 (2nd Cir. 1979).

The Fifth Amendment prohibition against double jeopardy protects an accused not only from a second prosecution on the same charge, but also from multiple prosecutions from the same conduct. *United States v. Benz*, 282 U.S. 304 (1931), and *Ex Parte Lange*, 18 Wall. 163, 21 L. Ed. 872 (1873). Acquittal or conviction of a lesser-included offense is a bar to prosecution for a greater offense arising from the same criminal conduct. *Brown v. Ohio, supra.*

The Double Jeopardy clause of the Fifth Amendment applies to conspiracy prosecutions. See *Jeffers v. United States*, 432 U.S. 137 (1977). A conspiracy case provides a unique jeopardy issue. Where the government offers evidence it establishes the scope of a conspiracy and, due the Double Jeopardy clause, defines what it may not again attempt to prove. *United States v. Kamins*, 479 F. Supp. 1374 (D.C.W.D. Penn. 1979) citing *Short v. United States*, 91 F.2d 614 (4th Cir. 1937). For purposes of conspiracy prosecutions, the extent of the conspiratorial agreement is the underlying evidence to be reviewed. *United States v.*

Palmero, 410 F.2d 468 (7th Cir. 1969). The Double Jeopardy clause bars repeated prosecutions for what is in law and fact one conspiracy. *United States v. Tercero*, 580 F.2d 312 (8th Cir. 1978).

In the indictment before the district court, the Petitioner was tried on the charges of conspiracy to commit bribery and bribery, Counts II, III and IV. Verdicts were rendered as to all said counts. The parties were the same in the previous bribery trial as in the RICO prosecution, namely, the United States of America and Anthony Liberatore, the Petitioner. The government then sought to relitigate crimes for which the Petitioner had already been put in jeopardy under the guise of a greater conspiracy—a RICO conspiracy. One of the essential elements the government sought to prove, two or more offenses in furtherance of the enterprise, was by proof of bribery which was previously charged in Counts III and IV and tried in the 1980 trial.

A prosecution under 18 United States Code §1962(d), RICO conspiracy, provides a unique double jeopardy context. *United States v. Meinster*, 475 F. Supp. 1093 (S.D. Fla. 1979), held that a prior §846 conviction (conspiracy to distribute narcotics) would prohibit a later §1962(d) RICO conspiracy conviction for the same activity. In accord are *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978), and *United States v. Ruigomez*, 576 F.2d 1149 (5th Cir. 1978), both of which held that application of a strict, same evidence test of *Blockburger v. United States*, 284 U.S. 299 (1932), would ". . . permit the government arbitrarily to split unitary . . . conspiracies and to initiate as many prosecutions." *Id.* at p. 1151. Cf. *United States v. Meinster, supra.*

The ultimate consideration here is whether the Petitioner was prosecuted twice for the same conspiracy

It is clear that the bribery offenses charged in Counts III and IV were the supporting substantive acts of a prosecution and conviction of conspiracy as charged in Count II. The conspiracy alleged in Count II charged all the defendants, with conspiracy, as did the RICO offense of Count I. The conspiracy Count II was alleged to have occurred between December, 1976 and March 9, 1978, whereas Count I, RICO conspiracy, is alleged to have occurred between May, 1976 and March 3, 1978. The RICO conspiracy prosecution offered as proof evidence charged as the overt acts performed in furtherance of Count II, Conspiracy; and the government repeatedly argued that the bribery was in furtherance of the enterprise to help the defendants carry on the enterprise without, or at least aware of, FBI surveillance of them.

To argue that the RICO prosecution is anything but a greater conspiracy prosecution as previously tried is to ignore the essential salient facts offered by the government. Hence, the charge of conspiracy to commit bribery in Count II bars prosecution on the greater conspiracy to violate the RICO statutes. Additionally, retrial of Count IV, bribery, a predicate act in support of a RICO prosecution violates the doctrines of collateral estoppel and double jeopardy.

B

The RICO prosecution was, in reality, a reprosecution of the Petitioner's state trial for the murder of Daniel Greene.

Bartkus v. Illinois, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), both established that where different sovereigns prosecuted the same activities, the double jeopardy clause was not a bar to successive prosecutions. However, a clear and undeniable exception

was established in *Bartkus v. Illinois, supra.* Where the role played by federal authorities in a state prosecution is such as to make that prosecution a mere sham and cover for a second federal prosecution, the Fifth Amendment bar against double jeopardy may be violated. See *Bartkus v. Illinois, id.* at pp. 123-124.

Evidence presented in both the federal and state prosecutions showed that a federal investigation into the activities of the "Cleveland Family" was already ongoing at the time of the death of Daniel Greene. The Cleveland Organized Crime Strike Force and the FBI, both of the Justice Department, had been conducting an investigation of the activities of the defendants and others for several years. During the period of time of this investigation, the FBI cultivated as a federal informant James T. Fratianno. Fratianno, although residing on the west coast, purportedly had close ties with several defendants and unindicted coconspirators in Ohio. Fratianno was a paid federal informant during several relevant time periods that investigations were being conducted into the deaths of Nardi and Greene and the bribery of FBI clerk Rabinowitz. Fratianno was a material witness on behalf of the prosecution during both the trial of the bribery case and Petitioner's state murder trial.

The extensive federal investigation involved here included the use of federally protected informants and witnesses; the obtaining and use of federally authorized telephonic intercept orders on telephones used by defendant Licavoli and James Fratianno; federally authorized electronic eavesdropping orders used to overhear conversations within the residence of defendant Licavoli; extensive physical surveillance of all the defendants and their activities; the obtaining and execution of federally authorized search warrants to search the separate residences of defendants

Licavoli and Petitioner, an apartment used by defendant Cisternino, an apartment located in Willoughby Hills, Ohio, the residence of one Carmen Marconi in Euclid, Ohio, and his vehicle, a Ford van, and the residence of Raymond Ferritto in Erie, Pennsylvania.

The formal prosecutions themselves began with complaints filed in the United States District Court for the Northern District of Ohio, Eastern Division. These complaints were filed along with the affidavit of Special Agent E. Michael Kehoe of the FBI which detailed the extensive surveillance of several defendants and hearsay evidence of confidential informants as told to Special Agent Kehoe. The foregoing search warrants, excepting that for Petitioner's residence, were issued concurrently with the arrest warrants for defendants Licavoli, Calandra, Cisternino, Carabbia, and others not indicted herein. The Petitioner and Lanci and Ciarcia were also later charged by federal complaint and Petitioner's home was searched by authority of a federal search warrant issued with a warrant for his arrest. Indictments were obtained from both the Cuyahoga County Grand Jury and the federal grand jury for the Northern District of Ohio, Eastern Division, upon the voluminous testimony and evidence given by federal agents and federal informants.

During pendency of the various trials in state and federal courts, the Department of Justice conducted scientific tests through the FBI and the Bureau of Alcohol, Tobacco and Firearms relating to fingerprints, handwriting analysis and comparisons, and detection of electronic telephone intercepts allegedly conducted by some defendants. The Bureau of Alcohol, Tobacco and Firearms in conjunction with the FBI conducted extensive ballistic and explosive tests and assisted in reconstructing bombs used to kill Nardi and Greene. All of this scientific evidence

was used during state and federal trials and presented to the jury in each state prosecution and the federal RICO prosecution. Fingerprint analysis was offered by the government during both trials before the district court on all counts in the indictment.

Federal law enforcement authorities utilized information from the following paid government informants: Daniel Greene, Raymond Ferritto, James Fratianno, Geraldine Rabinowitz, Jeffrey Rabinowitz, Louis Aratari, and Victor Guiles aka Renaldo Giuliani. Ferritto, Fratianno, Geraldine Rabinowitz, Aratari and Guiles all testified on behalf of the prosecution against the Petitioner in his murder trial in the Cuyahoga County Common Pleas Court. Fratianno, Geraldine Rabinowitz and Jeffrey Rabinowitz testified for the government during trial of Counts II, III and IV in the United States District Court. The testimony of both Rabinowitzes, Aratari, Guiles and readings of Ferritto's state trial testimony was offered by the government during the RICO trial, Count I. These government witnesses were all relocated through the Federal Relocated Witness Program, received and will continue to receive monies for their support and the maintenance of their families, have been given new, secret identities and employment through the program, consideration and leniency in prosecutions for a variety of crimes, and when a period of incarceration was ordered, time was served in federal institutions.

Although Counts II, III and IV pertaining to conspiracy to commit bribery and bribery are wholly federal violations, evidence of these crimes was offered by the State of Ohio in each prosecution and against each defendant in the Cuyahoga County Common Pleas Court when on trial for the murder of Daniel Greene. Although this offense is entirely within the jurisdiction of a federal prose-

cution, evidence of this crime was used by the prosecution in the Court of Common Pleas against the Petitioner, Anthony Liberatore.

Throughout each trial of the defendants in the Court of Common Pleas, a federal agent sat with the prosecution team at counsel table. In all said trials, federal agents testified extensively for the prosecution. During Petitioner's trial in the Court of Common Pleas, Special Agent Robert Fredericks of the FBI was present at and assisted the county prosecutors at the counsel table. The State of Ohio called numerous federal agents as witnesses, including Special Agent Anthony Riggio, Special Agent Douglas Domin, Special Agent Robert Fredericks, Special Agent Merwin Smith, Jr., Special Agent George Grotz, Special Agent Lydia Pugh, Special Agent Thomas Kimmel and Special Agent Robert Neckel.

As seen by the foregoing, the efforts of federal law enforcement personnel have been the source from which all prosecutions in this case and related state prosecutions have been conducted. The extensive searches, arrests, tests and experiments; the use of protected informants and witnesses; the source of testimony by federal officers and assistance at trial has been the singular catalyst to prosecutions for the deaths of Daniel Greene and John Nardi and bribery of FBI clerk Rabinowitz, whether conducted in the Cuyahoga County Court of Common Pleas or in the United States District Court.

Upon the foregoing, the Petitioner submits that the prior state prosecution was in reality the alter ego of a federal prosecution and the latter is prohibited by the Fifth Amendment prohibition against double jeopardy.

CONCLUSION

The Petitioner, having demonstrated important and timely reasons for review, now prays for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed January 9, 1984)

Nos. 82-3498, 3509, 3510, 3511, 3512, 3513, and 3606

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES T. LICAVOLI (82-3498),
ANTHONY LIBERATORE (82-3509, 82-3606),
JOHN P. CALANDRA (82-3510),
PACQUALE CISTERNINO (82-3511)
RONALD CARABBIA (82-3512),
KENNETH CIARCIA (82-3513),
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: MERRITT and KENNEDY, *Circuit Judges,* and PRATT, *District Judge.**

KENNEDY, *Circuit Judge,* delivered the opinion of the Court, in which PRATT, *District Judge* concurred. MERRITT,

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*Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

Circuit Judge, (pp. 23-24) filed a separate concurring opinion.

KENNEDY, *Circuit Judge.* The six defendant-appellants were convicted of conspiring to participate in the affairs of an enterprise [2] through a pattern of racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(c) and (d)[1] following a jury trial, and now appeal those convictions. Defendant Liberatore also appeals a denial of his motion for a new trial on a bribery conviction. All seven appeals have been consolidated. We affirm the judgments of conviction of all defendants.

In order to sustain a prosecution under RICO the government must establish that defendants engaged in a "pattern of racketeering activity," defined as at least two acts of racketeering activity. 18 U.S.C. § 1961(5). "Racketeering activity" is defined in 18 U.S.C. § 1961(1). The facts elicited by the prosecution at trial to prove the defendants' pattern of racketeering activity are lengthy and complex. Briefly, the government asserts (and we agree) that the evidence, viewed in the light most favorable to it, established the following.

I. Facts

Defendant Licavoli is a leader of organized crime in Cleveland. Liberatore is his second-in-command, and Ca-

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1. Those sections provide as follows:

(c) It shall be unlawful for any person to be employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to violate any of the provisions of subsections (a), (b), or (c) of this section.

landra also holds a position of confidence and responsibility within the organization. Carabbia and Cisternino act for the organization, carrying out the orders of the top men. Ciarcia manages a car dealership and supplies vehicles for the organization's criminal activities and also acts on behalf of the organization in other ways.

[3] In the spring of 1976 Licavoli decided that he needed to have one Danny Greene killed. Greene was the leader of a rival criminal organization which had developed a monopoly on criminal activity in West Cleveland. Licavoli had others in his organization contact Raymond Ferritto regarding his wish to have Greene killed.[2] Ferritto testified that he met at various times with each of the defendants (except Liberatore), sometimes separately, sometimes in groups, to plan Greene's murder. Ferritto stalked Greene for some months without success, sometimes assisted by Cisternino. After Ferritto had been on the job for some time he asked Licavoli for money to cover his expenses, and he was eventually given $5,000 by Carabbia. Licavoli also told Ferritto that he would get a percentage of money derived from gambling in the Warren and Youngstown areas when the murder was accomplished.

Ferritto and Cisternino attempted to bomb Greene's apartment building in order to kill him, but never carried through because of the regular presence of older people in the area. On another occasion they drove to a party attended by Greene intending to kill him. They located Greene's car but found that it was guarded by members of Greene's criminal organization seated in an adjacent car.

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2. Ferritto later testified against all six defendants in their state trials for Greene's murder.

Meanwhile Liberatore arranged with two other men, Aratari[3] and Guiles, to kill others in Greene's criminal organization, and ultimately to help kill Greene as well. Aratari and Guiles were at times assisted in their efforts by defendants Carabbia, Calandra, Cisternino and Ciarcia. Ciarcia and another man provided Aratari and Guiles with a car and weapons.

Licavoli had Greene's phone tapped in an effort to obtain reliable information regarding Greene's daily activities. Carabbia [4] and Cisternino gave Ferritto the resulting tapes. One tape revealed that Greene was to go to a dentist's appointment at 2:30 p.m. on Thursday, October 6, 1977. Defendants Licavoli, Cisternino and Carabbia played this tape for Ferritto on Monday, October 3.

On Thursday, the day of Greene's dentist appointment, Cisternino and Ferritto built a bomb in an apartment maintained by Cisternino. Ferritto drove to the vicinity of the dentist's office with the bomb in his car, a Plymouth. Carabbia drove a second car to the office, a Nova. This car had a special box mounted on the side in which the bomb was to be placed. Cisternino remained behind at the apartment to listen to a police scanner for calls. A few minutes after Ferritto and Carabbia arrived at the dentist's, Aratari and Guiles arrived in another car, supplied by Ciarcia as the car to be used in "the Danny Greene case." Guiles was armed with a high powered rifle. The plan was for Guiles to shoot Greene if he had the opportunity. The bomb was to be used as a backup method.

Greene arrived for his appointment, parked his car and entered the office. Guiles apparently had no opportunity to shoot. A few minutes later a parking space opened next

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3. Aratari testified at the trial in this case.

to Greene's car. Ferritto placed the bomb in the box on the side of the Nova, parked the Nova next to Greene's car, and activated the bomb. Then he got into the driver's seat of the Plymouth, which was parked down the block. When Greene emerged from the office Ferritto began to drive away, with Carabbia in the back seat. Carabbia then detonated the bomb with a remote control device and Danny Greene was killed.

All six defendants in the present case were tried for Danny Greene's murder in state court. Cisternino, Carabbia and Ciarcia were convicted of Greene's murder.

The RICO prosecution now on appeal also relied on a separate set of events to establish a predicate criminal act. [5] Ms. Geraldine Rabinowitz[4] worked as a file clerk in the Cleveland office of the FBI, while her then-fiance Jeffrey Rabinowitz worked at the car dealership that Ciarcia managed. In the spring of 1977 Ciarcia asked Ms. Rabinowitz to obtain confidential information from the FBI regarding investigations of himself, Liberatore, and Licavoli. Ms. Rabinowitz complied, after some hesitation, and continued to steal confidential information for Ciarcia from time to time throughout the summer of 1977. Ciarcia assured Ms. Rabinowitz that she would in return be "covered" for a down payment on a new home that she and her fiance planned to buy. On October 12, 1977 the Rabinowitzes met with Liberatore and Ciarcia, and the Rabinowitzes asked for $15,000 for a down payment on the home. Although Liberatore was at first unwilling to comply with this request, the next day he delivered a paper bag to Ms. Rabinowitz containing $15,000 in cash. Counsel for Liberatore characterized this payment as a "loan", but no interest was set, no repayment schedule made, and

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4. Ms. Rabinowitz testified at the federal bribery trial and the trial in this case.

no collateral specified. The stolen FBI documents were later found at Ciarcia's car dealership. All six defendants were charged with two counts of bribery and one count of conspiracy to commit bribery and were tried in federal court. Ciarcia pleaded guilty to all three counts, and Liberatore was convicted of the conspiracy count and one substantive count.

All six defendants were tried together in federal court for the RICO violation. The jury found all six guilty of having violated RICO. Defendants now raise a large number of issues on appeal.

II. Conspiracy to Murder May Be a Predicate Act for a RICO Conviction

The District Court instructed the jury that there were three possible acts which the jury could find to serve as [6] predicate acts of racketeering for the RICO charge. These were: 1) conspiracy to murder Danny Greene; 2) the murder of Danny Greene; and 3) bribery. The court instructed that the bribery act applied only to defendants Liberatore and Ciarcia. The jury therefore had to find that the other four defendants both conspired to murder, and murdered Danny Greene in order to convict them of the RICO violation. These four defendants (Licavoli, Calandra, Carabbia, Cisternino) now argue that conspiracy to commit murder cannot serve as a predicate act for a RICO conviction, and that their RICO convictions therefore cannot stand.

Under 18 U.S.C. § 1961(1)(A) racketeering activity includes "any act or threat involving murder. . . ." Conspiracy to murder on its face fits within this definition of racketeering activity. Conspiracy is "an act . . . involving murder." However the original versions of the bill that ultimately became RICO specifically included conspiracy

as a predicate act under section 1961, while the final bill did not. Defendants argue that Congress' failure specifically to enumerate conspiracy in the final version of the bill demonstrates a legislative intent not to allow conspiracy as a predicate act.

The Second Circuit rejected this argument with respect to conspiracies to commit acts listed in the definition of racketeering activity under section 1961(1)(D) in *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *See also United States v. Brooklier*, 685 F. 2d 1208, 1216 (9th Cir. 1982) (conspiracy to extort may be a predicate act), *cert. denied*, ... U.S. ....., 103 S. Ct. 1194 (1983); *United States v. Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana may be a predicate act), *cert. denied*, 455 U.S. 912 (1982).

Under 18 U.S.C. § 1961(1)(D), racketeering activity includes:

> [A]ny offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the [7] felonious manufacture, importation, receiving, concealment, buying selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

The Second Circuit in *Weisman* based its holding on the expansive language in (D), "any offense involving" the enumerated substantive crimes, "punishable under any law of the United States."[5] The court noted:

> This conclusion is bolstered by the fact that subsections (B) and (C) [of § 1961(1)], which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" lan-

5. This language also appeared in the original drafts of the bill that became RICO.

> guage of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.[6]

624 F.2d at 1124.

Subsection (A) of 18 U.S.C. § 1961(1) contains language similarly expansive to that in subsection (D). Under (A), racketeering activity includes "any act or threat involving" the substantive crime "chargeable under state law and punishable by imprisonment for more than one year." The "provisions of . . . [RICO] should be liberally construed to effectuate its remedial purposes."[7] Organized Crime Control Act of [8] 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. We see no indication that Congress intended conspiracy to commit murder not to be a predicate act under section 1961(1)(A) along with conspiracy to extort, to commit securities fraud or to import drugs under section 1961(1)(D). The Fifth Circuit took to the position that conspiracy to commit murder may be a predicate act in *United States v. Welch*, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), saying:

> There is merit to the argument that subsection A [of 18 U.S.C. § 1961(1)] is as broad and inclusive as the language of subsection D. If conspiracy to commit a section D offense can serve as a predicate

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6. *Cf. Brooklier, supra*, which holds that

> [c]onspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. § 1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. § 1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

685 F.2d at 1216.

7. Courts have construed the provisions of RICO liberally in applying its criminal remedies. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 245 n. 25 (1982), and cases cited therein.

> act for a RICO charge, then conspiracy to commit a subsection A offense should also be able to serve as a predicate act. The language of subsection A itself—which includes "any act or threat involving murder"—appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act *involving* murder. (emphasis in original)

We adopt the Fifth Circuit's reasoning in *Welch* and hold that conspiracy to commit murder may be a predicate act under 18 U.S.C. § 1961(1)(A) for a RICO charge.

III. Murder and Conspiracy to Murder Are Separate Offenses Under Ohio Law and May Both Be Predicate Acts Under RICO

For a defendant to be convicted under RICO he must have committed more than one act of racketeering activity. In order for a state crime, such as murder or conspiracy to murder to serve as a predicate act, it must be "chargeable under state law and punishable by imprisonment for more than one year" under 18 U.S.C. § 1961(1)(A). Federal law holds that conspiracy to commit a substantive offense and the substantive offense itself are two separate crimes. *See, e.g., Iannelli v. United States,* 420 U.S. 770, 777 (1975). Under Ohio law, conspiracy to murder and murder are also two separate crimes. **[9]** However, a person convicted of the substantive crime "shall not be convicted of conspiracy involving the same offense." Ohio Rev. Code § 2923.01(G). Thus under Ohio law a person cannot be convicted of or sentenced for both conspiracy to commit murder and the murder crime itself. Defendants argue that the two acts consequently are not both "chargeable under state law and punishable for more than one year."

We disagree, for two reasons. First Ohio law, in both the Ohio Revised Code and the earlier case law, provides that conspiracy to commit a substantive act and the substantive act are separate offenses, both separately chargeable under state law. In *State v. Lucas*, 85 N.E. 2d 154, 156 (Ohio Ct. C.P. 1949), the court stated:

> The conspiracy to commit a crime is an entirely different offense from the crime that is the object of the conspiracy. It is not a substantive offense, but essentially a crime of intent. It does not merge in the completed offense. The unlawful combination and confederacy constitute the essential element of criminal conspiracy rather than the overt acts done in pursuance thereof, and neither the success nor failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators.

Lucas predates the current Ohio statutory provision, Ohio Rev. Code § 2923.01.[8] The statute in *Lucas* made it a crime [10] to conspire to defraud. Under this statute, unlike the current one, a defendant could be convicted and sentenced separately for the substantive crime and conspiracy to commit the substantive crime. *Lucas* is significant here, however, for its articulation of the common

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8. The statute provides, in part:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:
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> (1) With another person or persons, plan or aid in planning the commission of any such offense;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

law of Ohio that the conspiracy and the substantive crime are "entirely different."

The Ohio Revised Code has not modified this common law precept. Murder is a crime, chargeable under Ohio law, Ohio Rev. Code § 2903.02, and punishable by imprisonment for more than one year, § 2929.02. Conspiracy is also a crime in Ohio, Ohio Rev. Code § 2923.01 (A), and is punishable by imprisonment for more than one year, § 2929.11. RICO nowhere indicates that two criminal acts otherwise qualifying as predicate acts may not both constitute predicate acts because under state law a defendant could not be convicted of or sentenced for both crimes.

Secondly, contrary to defendants' contention, it is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned for more than one year for both conspiracy to murder and murder. This argument has been raised and rejected several times in the context of state statutes of limitations, when the state statute has run on a state crime which is offered as a predicate act for a RICO violation. Courts have held that regardless of the running of the state statute the defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. § 1961 (1)(A). *United States v. Mandujano*, 583 F.2d 748, 758 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979); *United States v. Davis*, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977). The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law. *United States v. Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The Third Circuit noted in *United States* [11] *v. Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978):

> Section 1961 requires, in our view, only that the *conduct* on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be "chargeable under State law" at the time of the federal indictment. (emphasis in original)

We agree and hold that conspiracy to murder and murder may both constitute predicate acts in this case, regardless of the fact that a defendant cannot under Ohio law be separately punished for having committed both crimes. Ohio law does define the two acts as separate crimes, each punishable by imprisonment for more than one year, and this is all that is required under 18 U.S.C. 1961 (1)(A).

IV. Acquittal in State Court of Criminal Acts Does Not Bar Their Use as Predicate Acts for a RICO Conviction

Defendants Licavoli and Calandra were acquitted in state court proceedings of murdering Greene and conspiring to murder Greene. Consequently, they argue, they were not "chargeable" with the murder or conspiracy to commit murder, as required under 18 U.S.C. § 1961(1)(A), and murder and conspiracy to commit murder could not therefore serve as predicate acts for their RICO convictions.

We disagree. *Frumento* is directly on point. Defendants in that case were acquitted in state court on charges of bribery, extortion and conspiracy to accept bribes. They were then convicted in federal court of violating 18 U.S.C. § 1962(c) and (d), with the above crimes as predicate acts. On appeal defendants argued that the conviction was barred by the double jeopardy clause of the fifth amendment. The Third Circuit disagreed. The court said,

> [12] [RICO] forbids "racketeering," not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, is defined as a matter of legislative draftsmanship by a reference to state law crimes. This is not to say . . . that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971). (Footnote omitted.)

563 F.2d at 1087. *See also United States v. Phillips*, 664 F.2d 971, 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); *United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

V. The Prior Testimony of Raymond Ferritto Was Properly Admitted at Trial

Ferritto had testified at the state murder trials[9] of the six defendants. He refused to testify at the federal RICO trial, however, claiming that the government had breached its plea agreement with him, and consequently he had to serve more time than he had been promised. Also, he asked for immunity from prosecution for perjury as a condition of his testifying. The government granted him use immunity, that is immunity from the use of his testimony in the RICO case to prove that his prior testimony was perjurious, but granted him no immunity for any perjury he might commit

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9. There were three separate trials in state court: 1) the trial of Licavoli, Cisternino, and Carabbia; 2) the trial of Calandra, Ciarcia and Lanci (not a defendant in this action); and 3) Liberatore's trial The charges in all three trials were conspiracy to murder Danny Greene, and Greene's murder.

in the RICO trial itself. Ferritto still refused to testify and the court held him in contempt.

[13] The court then granted the government's motion to read Ferritto's testimony from the three state trials into the record, finding that Ferritto was "unavailable" within the meaning of Fed. Rule Evid. 804(a). The court instructed the jury that Ferritto's testimony in the state trial of Licavoli, Cisternino and Carabbia was admissible only against those three defendants; Ferritto's testimony from the trial of Calandra and Ciarcia was admissible only as to those two, and Ferritto's testimony in Liberatore's trial was admissible only against Liberatore. Ferritto's testimony in the first two trials was substantially the same. Upon the request of Liberatore's attorney the prosecution did not read Ferritto's full testimony from Liberatore's trial, but only the few lines that related specifically to Liberatore.

Defendants make several arguments regarding Ferritto's testimony. First they claim that the government was responsible for Ferritto's failure to testify. He was therefore not "unavailable" under Fed. Rule Evid. 804(a), and his testimony was inadmissible. Rule 804(a) states, in part, "[a] declarant is not unavailable as a witness if his . . . absence is due to the procurement or wrongdoing of the proponent of his statement *for the purpose of preventing the witness from attending or testifying*" (emphasis added). The law is clear that Ferritto's testimony, if otherwise admissible, was not made inadmissible by the government's actions unless the government actually sought to prevent the witness from testifying. *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1501 (1983); *United States v. Seijo*, 595 F.2d 116, 119-20 (2d Cir. 1979). This was hardly the case. Ferritto was the government's star wit-

ness. The government even offered him immunity from possible perjury prosecution to induce him to testify. There is no suggestion in the record that the government breached its plea agreement *in order* to prevent Ferritto from testifying at the RICO trial.

[14] Defendants further argue that Ferritto's testimony should not have been admitted because 1) defendants did not have an adequate motive and opportunity to cross-examine Ferritto in the state proceedings, and 2) admission of the prior testimony violated the confrontation clause of the sixth amendment.

Federal Rule of Evidence 804(b)(1) allows admission of prior testimony if the issues in both cases are sufficiently similar so as to give the party against whom the testimony is offered "an opportunity and similar motive to develop the testimony." Here the issues in the cases were nearly identical, since in the state cases the defendants were charged with murder and conspiracy to commit murder, and in the RICO prosecution these two acts constituted the predicate acts for the RICO conviction. Defendants argue that because of the additional "enterprise" element that must be shown in a RICO prosecution their motive to cross-examine was not the same here as in the state prosecutions. However, defendants have failed to point to any matter that they would have raised in cross-examination with respect to the enterprise element that they did not raise in the prior proceedings.

Each defendant certainly had adequate motive to cross-examine Ferritto with respect to testimony given in his own trial The jury was carefully instructed to consider against each defendant only the testimony that Ferrito had given at the defendant's own trial. We agree with defendants that it may be humanly impossible for a juror completely to compartmentalize multiple versions of an

event and apply each version only against a certain defendant. However, this is not to say that evidence implicating more than one defendant in a joint prosecution may never be admitted with an instruction that it applies only to a single defendant. In this case the testimony in the state trials was substantially the same, so it is hard to see how any of the defendants was prejudiced by admission of more than one version of the events. To the extent that there are discrepancies in Ferritto's testimony the jury was made [15] aware of these by virtue of having heard the different versions. The jury heard both Ferritto's direct testimony and cross-examinations. We cannot say that Ferritto's testimony was improperly admitted.

The above analysis applies as well with respect to defendants' confrontation clause argument. The Supreme Court long ago held that admitting testimony of an unavailable witness does not violate the confrontation clause. *Mattox v. United States*, 156 U.S. 237, 242-44 (1895). The confrontation clause requires that a hearsay declarant be unavailable, and that his statement bear some "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Mancussi v. Stubbs*, 408 U.S. 204, 213 (1974); *California v. Green*, 399 U.S. 149, 161 (1970); *Pointer v. Texas*, 380 U.S. 400, 407 (1965). We have concluded that Ferritto was unavailable. Ferritto has been cross-examined at length by one or more of the defendants on all of the testimony that was read to the jury and those cross-examinations were also read to the jury. All of the defendants have cross-examined Ferritto about the same set of facts. The defendants' motives for cross-examination at the state trials and the RICO trial were substantially identical. We find that the indicia of reliability necessary to satisfy the confrontation clause are present here and hold that Ferritto's testimony in the state prosecutions was properly admitted.

Defendants also claim that they were prejudiced by the fact that the District Court had Ferritto's testimony re-read to the jury, upon the jury's request, during jury deliberations. It is within the judge's discretion to re-read testimony for a deliberating jury. Indeed, the cases in this area generally challenge the judge's decision *not* to have the testimony re-read to the jury. *See, e.g., United States v. Toney,* 440 F.2d 590, 591-92 (6th Cir. 1971); *United States v. Almonte,* 594 F.2d 261, 265 (1st Cir. 1979). The transcripts of Ferritto's testimony are lengthy and comprised a large portion of the state's case, and it is understandable that the jury felt a need to hear **[16]** them a second time during deliberation. Defendants have failed to show that the District Court abused its discretion in allowing the transcripts to be read a second time.

VI. There Was Sufficient Evidence for the Jury to Convict the Defendants

Defendant Carabbia argues that there was insufficient evidence to show that defendants agreed to participate in the affairs of the enterprise. We find this claim to be wholly without merit, as the summary of facts recited above—taken from testimony introduced at trial—demonstrates.

Defendant Liberatore argues that there was insufficient evidence to establish that he and Ciarcia bribed Ms. Rabinowitz to provide them with confidential FBI information and documents. This Court dealt fully with this question and resolved it against Liberatore in *United States v. Lanci and Liberatore,* 669 F.2d 391, 393 (6th Cir.), *cert. denied,* 457 U.S. 1134 (1982), and we will not consider it further here.

VII. Principles of Double Jeopardy Did Not Bar the Government From Using Bribery as a Predicate Offense for the RICO Convictions

Defendants Liberatore and Ciarcia were convicted in federal court of bribing Ms. Rabinowitz. This bribery offense was also used as a predicate act for the RICO convictions of these two defendants. Liberatore and Ciarcia now claim that use of the bribery offense in the RICO prosecution violated the double jeopardy clause of the fifth amendment.

The Supreme Court articulated the analysis to be applied to statutory schemes in order to evaluate them for double jeopardy purposes in *Whalen v. United States*, 445 U.S. 684 (1980). First, courts should apply the "*Blockburger* test" articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), in order to determine whether the same act constitutes a violation of two distinct statutory provisions. To see whether [17] there are two offenses or only one the court must determine whether *each* provision requires proof of a fact which the other does not. When the offenses are the same under the *Blockburger* test, *Whalen* holds that "cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress." 445 U.S. at 692.

Even if the predicate act of bribery and the RICO charge fail the *Blockburger* test, which we do not decide,[10] Congress did specifically authorize cumulative sentences under RICO. *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982); *United States v. Anderson*, 626 F.2d 1358, 1367 (8th

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10. *Cf. United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), in which the court concluded that the enterprise element of the RICO offense constitutes an element of the crime not required for the predicate criminal acts.

Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). As the *Rone* court noted:

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.

598 F.2d at 571.

[18] This Court has ruled on a closely related question in *United States v. Morelli*, 643 F.2d 402 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981). Morelli was convicted of two counts of wire fraud, and these acts were used as predicate offenses for a RICO conviction. Morelli complained that he was subject to cruel and unusual punishment in violation of the eighth amendment because he was sentenced to fifteen years for the RICO violation, in addition to ten years for the wire fraud crimes.[11] We held that Congress "may constitutionally make the commission of crimes within a specified period of time and within the course of a particular type of enterprise an independent

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11. Appellants Liberatore and Ciarcia are serving concurrent, not consecutive sentences for their bribery and RICO convictions.

criminal offense. . . ." 643 F.2d at 413. We now hold that there was no violation of double jeopardy in trying defendants Liberatore and Ciarcia for both the federal bribery charge and the RICO charge.

VIII. The District Court Did Not Err in Its Evidentiary Rulings

We have reviewed defendants' challenges to various evidentiary rulings made by the District Court in admitting:

(1) references to court-ordered electronic surveillance of Licavoli in which the agent referred to Licavoli's activities as "criminal";

(2) references to prosecution witnesses as being in the Witness Protection Program as suggesting that defendants had threatened the witnesses;

(3) references to plea bargaining agreements as suggesting that the government vouched for the truthfulness of the witness' testimony;

(4) the admission of the co-conspirator statements under Fed. Rule Evid. 804(d)(2)(E) as violating the confrontation clause of the sixth amendment.

We find all of these challenges to be without merit.

[19] IX. The District Court Did Not Err in Denying Defendants' Motion for Severance

Defendants Licavoli, Calandra and Cisternino argue that the District Court erred in failing to grant their motions for severance at trial under Rule 14, Fed. R. Crim. Pro. They argue that they were prejudiced by evidence offered against other defendants at trial, and that the court's instructions to the jury could not have obviated that prej-

udice. Defendants complain primarily of evidence of bribery introduced against Liberatore and Ciarcia.

Rule 14 provides that severance may be granted if substantial prejudice would result to an individual defendant tried jointly with another.[12] The question of whether to grant a motion for severance is committed to the trial court's discretion, and rulings under Rule 14 are reviewable only on abuse of discretion. *United States v. Goldfarb*, 643 F.2d 422, 434 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981); *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (en banc); *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975), *cert. denied*, 434 U.S. 903 (1977).

The general rule in conspiracy cases is that persons indicted together should be tried together. *United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983); *United States v. Dye*, 508 F.2d 1226, 1236 (6th Cir.), *cert. denied*, 420 U.S. 974 (1975); *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). This is particularly the case when, as here, offenses charged may be established against all the defendants with the same evidence. *United States v. Hamilton*, 689 F.2d 1262, 1275 **[20]** (6th Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 753 (1982); *Dye*, 508 F.2d at 1236; *United States v. McPartin*, 595 F.2d 1321, 1333 (7th Cir. 1979). The potential prejudice to the defendant must be balanced against competing societal goals of efficient and speedy trials. *United States v. Davis*, 707 F.2d 880 (6th

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12. Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

Cir. 1983); *United States v. Kopituk*, 690 F.2d 1289, 1317-18 (11th Cir. 1982); *Dye*, 508 F.2d at 1236; *United States v. Rogers*, 475 F.2d 821, 828 (7th Cir. 1973). However, a single joint trial is impermissible if it violates a defendant's right to a fundamentally fair trial. *Echeles*, 352 F.2d at 896; *Barton v. United States*, 263 F.2d 894, 898 (5th Cir. 1959).

Courts have put a heavy burden on defendants seeking severance, requiring a strong showing of prejudice. *Opper v. United States*, 348 U.S. 84, 94 (1954); *Hamilton*, 689 F.2d at 1275; *Bright*, 630 F.2d at 813; *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978). An especially compelling showing is required in RICO prosecutions. As the court noted in *United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 492 (1982), "in a case of this nature it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed."

Upon a careful review of the record we cannot say that defendants have shown the compelling prejudice required for a granting of severance. At the heart of defendants' severance claim is the fact that some of them were not named in all three of the predicate racketeering acts for which evidence was introduced. We recently held in *Davis* that this circumstance alone does not necessitate severance. 707 F.2d at 883. The jury was carefully instructed that the evidence of bribery was admissible only against Liberatore and Ciarcia, and there is nothing in the record to indicate that the jurors were confused or misled. Testimony regarding the other defendants in connection with the circumstances of the bribery was tangential, and overshadowed by the major role in the events played by Liberatore and Ciarcia. The slight potential [21] prejudice to defendants Licavoli, Calandra and Cis-

ternino in this case by these tangential references is outweighed by the judicial and societal interests in trying all of the defendants together. We hold that the trial judge did not abuse his discretion in denying defendants' motion for severance.

X. The District Court Did Not Err in Declining to Excuse a Juror During the Trial

Mr. McCourt, a juror in defendants' RICO trial, discovered late in the presentation of the government's case that he was acquainted with one of the government's witnesses, a Ms. Weiss who managed the apartment house involved in the aborted bombing attempt. Mr. McCourt knew Ms. Weiss because his aunt and uncle lived in the same building as Danny Greene, but had not known Ms. Weiss' last name until he saw her at trial.

Defendant Licavoli maintains that the juror "wilfully concealed material facts bearing on his suitability." However, Mr. McCourt had stated during jury selection that he had had some contacts with Danny Greene. He could not have concealed his acquaintance with the witness because he did not know that she would be a witness until he saw her at trial. At that time he promptly informed the court that he knew Ms. Weiss. The trial judge then questioned Mr. McCourt regarding his ability to make an impartial judgment, and Mr. McCourt said that he felt he could. It is hard to see how Mr. McCourt's nodding acquaintance with a minor witness for the prosecution could have seriously prejudiced defendants. Ms. Weiss testified that Danny Greene lived with a woman in the apartment building that she managed, and that she had found a box and a bottle on the property. These facts were not in dispute, and counsel for defendant Licavoli chose not to cross-examine Ms. Weiss. Mr. McCourt had

personal knowledge that older people frequently congregated in the lobby of the building, but this fact was also not in dispute. Accordingly [22] we hold that the District Court did not err in its failure to excuse Mr. McCourt.

XI. The District Court Did Not Err in Denying Liberatore's Motion for a New Trial

Defendant Liberatore appeals a denial of a motion for a new trial on his federal bribery conviction. Liberatore argues that there were significant inconsistencies in the testimony of witnesses who testified against him. The District Court found these inconsistencies to be insubstantial, and, having reviewed the record, we agree.

Defendants have raised a number of other claims, which we do not discuss here. We have considered these and find them without merit. We affirm defendants' RICO convictions and affirm the District Court's denial of Liberatore's motion for a new trial.

[23] MERRITT, *Circuit Judge*, concurring. I concur in the clear and well reasoned opinion prepared by Judge Kennedy.

It may seem strange for a federal court to uphold convictions under a federal statute based on two underlying predicate state offenses for which a defendant has either been acquitted at state trials (the murder of Danny Greene) or for which he could not be separately convicted or punished under state law (conspiracy to murder Danny Greene). But RICO is now unique. The normal rules of construction do not apply to RICO. Although I had earlier believed that normal canons of construction applicable to other criminal statutes should be applied to RICO, *see United States v. Sutton*, 605 F.2d 200 (1979), *reversed en banc*, 642 F.2d 1001, 1042 (6th Cir. 1980) (Merritt,

J., dissenting), the Supreme Court has now made it clear that RICO is to be given the broadest and most expansive possible interpretation in order to carry out Congressional intent aimed at eliminating organized crime. *See United States v. Turkette*, 452 U.S. 576 (1981) (RICO not limited to infiltration of a legitimate "enterprise"); *Russello v. United States*, 104 S.Ct. 296 (1983). In *Russello*, a unanimous Supreme Court has pointed to RICO as the only federal criminal statute which should receive this kind of broad and expansive interpretation:

> The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. . . . Further, Congress directed, by § 904(a) of Pub. L. 91-452, 84 Stat. 947: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." *So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive.* . . .

104 S.Ct. at 302. (emphasis added). Thus, RICO, liberally construed as required by the Supreme Court, can reasonably be interpreted, and therefore should be interpreted, **[24]** so that a defendant can be convicted even though he has already been acquitted or convicted of the two underlying offenses in state court and even though he could not be convicted or punished for both offenses together under state law.

In view of the Supreme Court's decisions in *Turkette* and *Russello*, I therefore agree with our Court's expansive construction of RICO in sections II, III, IV and VII.

On the question of the admissibility of Ferrito's prior testimony in the three state trials, the existence of the

"enterprise" element in RICO is not a bar to admissibility, as defendants argue, because the "enterprise" element, in light of the Supreme Court's holding in *Turkette*, has become a fiction. It has become synonymous with another element of the offense, namely, the "pattern of racketeering activity," *i.e.*, the two underlying state offenses. The "enterprise" element now adds nothing to the so-called "pattern" element. The two predicate offenses are the "enterprise." All that is now required for a RICO offense is the commission of two predicate offenses which the state defines as separately chargeable and separately punishable. No further indicia of "enterprise" is now necessary.

INDICTMENT IN THE UNITED STATES DISTRICT COURT

(Filed May 3, 1979)

No. CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI,
a/k/a "Jack White";
ANTHONY LIBERATORE;
JOHN P. CALANDRA;
PASQUALE CISTERNINO,
a/k/a "Butchie";
RONALD CARABBIA;
THOMAS LANCI;
KENNETH CIARCIA;
Defendants.

Violations: T. 18, U.S.C. §§ 1962(d), 1963, 371 & 201(b)(3)

INDICTMENT

The Grand Jury charges that:

COUNT I

1. From in or about May, 1976, and continuing thereafter up to and including on or about March 3, 1978, in the Northern District of Ohio, Eastern Division, and

elsewhere, JAMES T. LICAVOLI, also known as "Jack White", ANTHONY LIBERATORE, JOHN P. CALANDRA, PASQUALE CISTERNINO, also known as "Butchie", RONALD CARABBIA, THOMAS LANCI, and KENNETH CIARCIA, defendants herein and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as co-conspirators but not as defendants, unlawfully, willfully, and knowingly, did combine, conspire, confederate, and agree together, with each other, and with other persons unknown to the Grand Jury to commit an offense against the United States; that is, to violate Title 18, United States Code, § 1962(c).

[2] 2. It was a part of said conspiracy that JAMES T. LICAVOLI, also known as "Jack White", ANTHONY LIBERATORE, JOHN P. CALANDRA, PASQUALE CISTERNINO, also known as "Butchie", RONALD CARABBIA, THOMAS LANCI, and KENNETH CIARCIA, the defendants herein, and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as coconspirators, but not as defendants, being associated with an enterprise engaged in and the activities of which affected interstate commerce, that is, a group of individuals associated in fact to control the criminal activities in various cities in the Northern District of Ohio, by means of murder, bribery, and activities, would unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, including murder, conspiracy to murder, and bribery as defined in Title 18, United States Code,

Sections 1961(1)(A), 1961(1)(B), and 1961(5), and as hereinafter further described.

3. It was further a part of said conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; and JOHN P. CALANDRA; and Anthony Delsanter, also known as "Tony the Dope", named herein as a coconspirator, but not as a defendant, would engage in the commission, carrying on and supervising of criminal activity in various cities in the Northern District of Ohio and receive monies as a result of such activity.

4. It was further a part of said conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Burchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA; and Anthony Delsanter, also known as "Tony the Dope"; Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic" and Louis Aratari, also known as "Tony", named herein as coconspirators, but not as defendants, would commit, carry on, [3] and supervise, criminal activity in various cities in the Northern District of Ohio by use of acts and threats involving murder.

5. It was further a part of the conspiracy that the defendants, the unindicted coconspirators, and other persons would intercept wire communications, to wit, telephone conversations, of one Daniel J. Greene for the purpose of learning the planned whereabouts of Greene, and did use said tape recordings in order to locate Greene.

6. It was further a part of the conspiracy that the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; THOMAS LANCI; and KENNETH CIARCIA, would

corruptly give and loan and promise to give and loan things of value, including approximately $15,900, more or less, to Geraldine M. Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice in return for confidential information contained in the official files and records of the Federal Bureau of Investigation.

7. It was further a part of said conspiracy that Raymond William Ferritto, named herein as a coconspirator but not as a defendant, would travel from the State of Pennsylvania to the Northern District of Ohio.

8. In furtherance of said conspiracy and to effectuate the objects thereof, the defendants and others committed the following acts and pattern of racketeering:

a. That from in or about June, 1976, up to and including on or about May 17, 1977, in the Northern District of Ohio, and elsewhere the defendants, JAMES T. LICAVOLI, also known as "Jack White"; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; and RONALD CARABBIA; and Anthony Delsanter, also known as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", and Raymond William Ferritto, named herein as co-murder [4] one John Nardi in violation of Ohio Revised Code, § 2923.01, a felony punishable by imprisonment of more than one year.

b. From in or about June, 1976, up to and including on or about October 6, 1977, in the Northern District of Ohio, and elsewhere, defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, and Anthony Delsanter, also known

as "Tony the Dope", Aladena T. Fratianno, also known as "Jimmy Fratianno", Raymond William Ferritto, Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as coconspirators but not as defendants, conspired to murder one Daniel J. Greene, in violation of Ohio Revised Code, § 2923.01, a felony punishable by imprisonment of more than one year.

c. On or about October 6, 1977, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA; and Raymond William Ferritto, Aladena T. Fratianno, also known as "Jimmy Fratianno", Ronald A. Guiles, also known as "Vic", and Louis J. Aratari, also known as "Tony", named herein as coconspirators but not as defendants, did murder and aid and abet in the murder of Daniel J. Greene by means of an explosive device in violation of Ohio Revised Code, § 2903.01.

[5] d. In or about June or July, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA corruptly did, directly and indirectly, give things of value, including approximately $1,000, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in

the official files and records of the Federal Bureau of Investigation, in violation of Title 18, United States Code Section 201(b)(3).

e. In or about October, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, the defendants JAMES T. LICAVOLI, also known at "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA corruptly did, directly and indirectly, give things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, in return for confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 201(b)(3).

[6] 9. The respective interests of defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA in the assets of the previously described group associated in fact, constitute the present form of an enterprise the defendants conspired to conduct and participate in, directly and indirectly, in violation of Title 18, United States Code, § 1962(d), and are to their full extents subject to forfeiture to the United States of America under the provisions of Title 18, United States Code, § 1963(a).

All in violation of Title 18, United States Code, §§ 1962(d) and 1963.

[7] The Grand Jury further charges that:

COUNT II

1. From in or about December, 1976, and continuously thereafter, up to and including the 9th day of March, 1978, in the Northern District of Ohio, Eastern Division, and elsewhere, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, defendants herein, and Anthony Delsanter, also known as "Tony the Dope" and Raymond William Ferritto, named herein as coconspirators but not defendants, willfully and knowingly did combine, conspire, confederate, and agree together, with each other, and with diverse other persons to the Grand Jury unknown to commit an offense against the United States; that is, to corruptly, directly and indirectly, give things of value to Jeffrey Rabinowitz, also known as Jeffrey Rabin, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 201(b)(3); and to defraud the United States by depriving the Federal Bureau of Investigation of the United States Department of Justice of and concerning its right to have its employees free to transact the official business of the United States unhindered, unhampered, unobstructed, and unimpaired by the exertion upon them of dishonest, corrupt, unlawful, improper, and undue pressure and influence.

[8] 2. It was a part of the conspiracy that the defendants would ask Geraldine Rabinowitz also known as Geraldine Linhart, to use her position with the Federal Bureau of Investigation in order to obtain confidential information concerning defendants JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; THOMAS LANCI; KENNETH CIARCIA and other persons; that the defendants did receive such confidential information from Geraldine Rabinowitz, also known as Geraldine Linhart; and that the defendants agreed to give and did give things of value to Geraldine Rabinowitz, also known as Geraldine Linhart in return for said confidential information.

3. It was further a part of the conspiracy that the defendants would exchange the information obtained from Geraldine Rabinowitz, also known as Geraldine Linhart among themselves and with other persons.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and coconspirators performed the following overt acts in the Northern District of Ohio, Eastern Division:

1. In or about December, 1976, KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart, and Jeffrey Rabinowitz, also known as Jeffrey Rabin.

2. In or about the Spring of 1977, Geraldine Rabinowitz, also known as Geraldine Linhart and Jeffrey Rabinowitz, also known as Jeffrey Rabin met with KENNETH CIARCIA and turned over to CIARCIA an official report of the Federal Bureau of Investigation concerning JAMES T. LICAVOLI, also known as "Jack White".

[9] 3. In or about June, 1977, ANTHONY LIBERATORE and KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart and gave and loaned her $1,000.

4. In or about July or August, 1977, JAMES T. LICAVOLI, also known as "Jack White", and Anthony Delsanter, also known as "Tony the Dope", met with Raymond William Ferritto in Warren, Ohio.

5. Between on or about the 2nd day of August, 1977, and on or about the 6th day of August, 1977, JAMES T. LICAVOLI, also known as "Jack White", had in his possession a copy of portions of a report of the Federal Bureau of Investigation previously supplied to KENNETH CIARCIA by Geraldine Rabinowitz, also known as Geraldine Linhart.

6. In or about August or September, 1977, JOHN CALANDRA and PASQUALE CISTERNINO, also known as "Butchie" met with Raymond William Ferritto.

7. On or about the 24th day of September, 1977, ANTHONY LIBERATORE met with Geraldine Rabinowitz, also known as Geraldine Linhart.

8. On or about the 13th day of October, 1977, ANTHONY LIBERATORE, THOMAS LANCI, and KENNETH CIARCIA met with Geraldine Rabinowitz, also known as Geraldine Linhart and Jeffrey Rabinowitz, also known as Jeffrey Rabin and gave and loaned them approximately $15,000, more or less.

9. Between in or about August, 1977, and the 5th day of December, 1977, JOHN P. CALANDRA had in his possession a portion of a report of the Federal Bureau of Investigation previously supplied to KENNETH CIARCIA by Geraldine Rabinowitz, also known as Geraldine Linhart.

[10] 10. In or about February, 1978, ANTHONY LIBERATORE met with Geraldine Rabinowitz, also known as Geraldine Linhart.

All in violation of Title 18, United States Code, Section 371.

[11] The Grand Jury further charges that:

COUNT III

In or about June or July, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, Eastern Division, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, the defendants herein, corruptly did, directly and indirectly, give, offer and promise, things of value, to Jeffrey Rabinowitz, also known as Jeffrey Rabin, named herein as a co-accomplice but not as a defendant, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation.

All in violation of Title 18, United States Code, Section 201(b)(3).

[12] The Grand Jury further charges that:

COUNT IV

In or about October, 1977, the exact date being to the Grand Jury unknown, in the Northern District of Ohio, Eastern Division, JAMES T. LICAVOLI, also known as "Jack White"; ANTHONY LIBERATORE; JOHN P. CALANDRA; PASQUALE CISTERNINO, also known as "Butchie"; RONALD CARABBIA; THOMAS LANCI; and KENNETH CIARCIA, the defendants herein, corruptly did, directly and indirectly, give, offer and promise, things of value, to Jeffrey Rabinowitz, also known as Jeffrey Rabin, named herein as a co-accomplice but not as a defendant, and to Geraldine Rabinowitz, also known as Geraldine Linhart, an employee of the Federal Bureau of Investigation of the United States Department of Justice, with the intent to induce Geraldine Rabinowitz, also known as Geraldine Linhart, to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation.

All in violation of Title 18, United States Code, Section 201(b)(3).

This is a True Bill.

.....

Foreman

/s/ JAMES R. WILLIAMS

United States Attorney

Northern District of Ohio

/s/ STEVEN R. OLAH

Special Attorney

Criminal Division

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 5, 1982)

CR79-103

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES T. LICAVOLI, *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

In Count I, the remaining count of the indictment, defendants have been charged with conspiracy under 18 U.S.C. §1962(d) to violate 18 U.S.C. §1962(c) both of which sections are part of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.*[1]

1. Section 1962:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Defendants Licavoli and Calandra, separately, and defendants Cisternino and Carabbia jointly move for dismissal of Count I. It is claimed that their [2] prosecution is barred by collateral estoppel under the Double Jeopardy Clause by virtue of their acquittal on Counts II, III, and IV of the indictment during the June - July 1980 trial. Convicted of Counts II and IV (Counts I and III at trial), but acquitted of Count III (Count II at the trial), defendant Liberatore also moves for dismissal on Count I based on the Double Jeopardy Clause and collateral estoppel by virtue of the jury's verdicts.

As the background of these motions it is apt to repeat the history of criminal prosecutions, state and federal, which involve these defendants as that history is set forth in this court's memorandum of October 10, 1979. In that ruling this court overruled double jeopardy and collateral estoppel motions pressed by defendants.

I.

A.

On October 6, 1977, Daniel Greene was killed when a car parked next to his in a parking lot exploded as he was entering his car. In connection with that death, several individuals, including defendants in this action Licavoli, Cisternino, Carabbia, and Calandra, were indicted on December 5, 1977 by a state grand jury for aggravated arson [O.R.C. §2909.02]; aggravated murder, with specifications [O.R.C. §2903.01]; engaging in organized crime [O.R.C. §2923.04]; and conspiracy to commit aggravated murder and aggravated arson [3] [O.R.C. 2923.01]. These same individuals, except Raymond Ferritto, were indicted by a federal grand jury on January 6, 1978 for conspiracy

to violate 18 U.S.C. §1962(c) in violation of 18 U.S.C. §1962(d).

On March 7, 1978, another group of individuals, including defendants in this action Lanci, Ciarcia, and Liberatore, were indicted by a state grand jury for aggravated murder, with specifications, aggravated arson, and engaging in organized crime, also in connection with the death of Daniel Greene. In March 1978, a complaint charging defendant Lanci with a violation of 18 U.S.C. §1962(d) was issued by a federal magistrate. Although a preliminary hearing was held on March 7, 1978 and defendant Lanci was bound over to the grand jury, he was not indicted until the present indictment was handed down in May 1979.

Defendants Licavoli, Cisternino, and Carabbia were tried on the state charges in February through May 1978. The state court had earlier dismissed both conspiracy charges against defendants Licavoli, Cisternino, Carabbia, and Calandra upon a motion by the state. Defendant Licavoli was acquitted of all other charges; defendants Cisternino and Carabbia were acquitted of engaging in organized crime and of the second specification under the aggravated murder count (that the murder was committed for hire), but were convicted of aggravated arson, aggravated murder, and of the first specification [4] (that the murder was committed in the course of committing aggravated arson).

Defendants Calandra, Ciarcia, and Lanci were tried in state court in June, July and August 1978. The trial judge ordered a judgment of acquittal on the organized crime charge. Defendant Calandra was acquitted of the other charges. Defendants Ciarcia and Lanci were convicted of aggravated murder, but acquitted of the specifications and of aggravated arson.

> The federal indictment was voluntarily dismissed by the United States on September 7, 1978. The dismissal occurred during the pretrial stage of the case but just shortly before the scheduled trial date. [Footnotes omitted.]

Count I of a four-count indictment returned on May 3, 1979 recharged the defendants with a section 1962(d) (RICO) conspiracy charge as delineated above. Not included in the original federal indictment, count II charged the defendants with a conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §201(b)(3) (the federal bribery statute), and counts III and IV charged substantive violations of the same federal bribery statute.

As predicate acts in support of the RICO charge[2] the government alleged that the defendants (except [5] defendant Liberatore) conspired to murder one John Nardi; conspired to murder one Daniel Greene; murdered and aided and abetted in the murder of Daniel Greene; "corruptly did, directly and indirectly, give things of value, approximately $1,000, more or less to Geraldine Rabinowitz;" and "corruptly did, directly and indirectly, give things of value, including approximately $14,900, more or less, to Geraldine Rabinowitz. . . ."

On October 18, 1979 this court dismissed Count I, holding that under United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), it failed to state an offense under 18 U.S.C. §1962. On December 21, 1979 the count was reinstated pending a rehearing of *Sutton en banc* and final resolution

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2. The phrase "pattern of racketeering activity" found in section 1962(c) and incorporated into section 1962(d) is defined as "requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. §1961(5).

of the issue by the Supreme Court; the trial of the count, however, was severed from the trial of Counts II-IV.

The selection of the jury in the trial of Counts II-IV commenced on May 19, 1980. Opening statements began June 9. On June 23, at the end of the presentation of the government's evidence, the court directed a verdict for defendants Cisternino and Carabbia on all counts and for defendant Calandra on Count III (Count II at trial) and otherwise denied the directed verdict motions of the defendants. The jury returned its verdict on July 3, 1980. Defendants Licavoli and Calandra were acquitted on all counts. Defendants Liberatore and Lanci were acquitted on Count III (Count II at the trial) but convicted on Counts II and IV (Counts I and III at the trial).[3]

[6] Subsequent to the federal prosecution, defendant Liberatore was tried in state court for aggravated murder and aggravated arson in the murder of Daniel Greene. On November 6, 1980 the jury acquitted Liberatore on the aggravated arson charge; there was a hung jury on the aggravated murder charge, and a mistrial was declared.

Defendant Liberatore appealed to the Eighth District Court of Appeals, Cuyahoga County, Ohio, the trial court's February 8, 1980 denial of defendant's motion to enter a judgment of acquittal and to dismiss the second and remaining charge of aggravated murder within the indictment and, alternatively, to bar a retrial of the aggravated murder charge as violative of defendant's right against double jeopardy. By a two to one vote the court of appeals on January 14, 1982 reversed the trial court.[4]

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3. Defendant Ciarcia had pled guilty to all counts.

4. The court (Judges Stillman and Day) concluded:

[W]e hold that under the facts and indictment in this case, the double jeopardy provisions of the United States and Ohio

(Continued on following page)

[7] II.

Double Jeopardy and Collateral Estoppel— Prior State Prosecutions

Defendants raise objections to the current prosecution on the grounds of double jeopardy and collateral estoppel.[5] The basis for their position is the requirement of 18 U.S.C. §1962(c), and, hence, by incorporation, section 1962(d), of a showing of "a pattern of racketeering activity."

Footnote continued—

Constitutions preclude a subsequent prosecution for aggravated murder where the defendant-appellant has been acquitted of aggravated arson, an element specifically made necessary through the language of the aggravated murder and indictment. A second prosecution on the aggravated murder charge would necessitate a complete and identical relitigation of factual issues already resolved in the first trial.

In dissent, Judge Parrino concluded:

[T]he jury, in acquitting appellant of aggravated arson, could rationally have based its verdict on the fact that the state did not prove that appellant had actual knowledge that aggravated arson (*i.e.*, bombing) was to be committed.[2] His acquittal of aggravated arson merely resolved the issue that appellant was not an accomplice to aggravated arson. A jury has not yet decided the issue of whether the appellant was an accomplice to a scheme to murder Daniel Greene and whether that ultimate objective was accomplished by the principals by means of aggravated arson. Thus, collateral estoppel does not preclude a second trial on the issue of whether appellant was an accomplice to aggravated murder where the principals Carabbia and Ferrito committed the underlying aggravated arson to accomplish the killing and thereby achieved the goal of all the co-conspirators.

2. Aggravated arson is defined in R.C. 2909.02, which provides in part:

"(A) No person, by means of fire or explosion, shall knowingly:

"(1) Create a substantial risk of serious physical harm to any person. . . ."

The complicity statute, R.C. 2923.03, requires the accomplice to act with the kind of culpability required for the commission of the underlying offense (in this case "knowingly").

5. The individual motions are styled as motions to dismiss the indictment or motions to exclude evidence.

"Racketeering activity" is defined, in part, as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing [8] in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . ." 18 U.S.C. §1961(1)(A). "Pattern of racketeering activity" is defined, in part, as requiring "at least two acts of racketeering activity. . . ." 18 U.S.C. §1961(5). See n.2, *supra*. Defendants urge that since among the "predicate acts" asserted by the government there are state offenses for which they have already been tried, the retrial of those acts to prove a RICO offense is barred by double jeopardy and collateral estoppel.

Prior to the 1980 federal trial, the affected defendants moved to bar the federal prosecution on double jeopardy grounds by reason of the state prosecution. This court denied all motions based on that argument in *United States v. Licavoli*, No. CR79-103 (N.D. Ohio, memorandum and order filed October 10, 1979), relying upon *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), and the dual sovereignty rule established therein.

The defendants argue here, as they did in the earlier motions, that federal authorities participated in and controlled the state prosecution to such an extent that the state prosecution became a federal one, hence barring another federal prosecution for the same acts.

Accepting as true for purposes of deciding the motion that "the federal government's involvement in the state litigation was as the defendants characterize [9] it," this court in its October 10, 1980 memorandum found that these circumstances "do not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution and thereby in essential fact another federal

prosecution." The court concluded that, given the seriousness of the charges and the state's interest in enforcing its criminal statutes, "the *bringing* of the state prosecution [could not] be said to be of the federal government's doing." Slip op. at 13.

Furthermore, this court concluded that "[t]he existence of federal-state cooperation does not change this conclusion or establish that the conducting, rather than the bringing, of the state prosecution was such that the federal government should be bound by its result." *Id.* Such a conclusion was mandated by *Bartkus* and reached by the courts in *United States v. Johnson*, 516 F.2d 209 (8th Cir.), *cert. denied*, 423 U.S. 859 (1975), and *United States v. Richardson*, 580 F.2d 946 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979). This court concluded:

> The record of this case to date reveals that federal agencies, particularly the FBI, apparently had an on-going investigation of several individuals connected with the case including Daniel Greene and some of the defendants. It is not surprising then that the federal government would be in possession of evidence relevant to the state charges and that federal agents would be called to testify at the state trial. The fact that the state made use of this evidence does not establish that its prosecution was simply a sham or a cover for a federal prosecution.

Slip op. at 14.

[10] Relying upon *Ashe v. Swenson*, 397 U.S. 436 (1970), defendants argued that federal prosecutors were collaterally estopped from relitigating issues determined in the state litigation. This court pointed out that *Ashe* held that the doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined

by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit." Slip op. at 15-16, quoting 397 U.S. at 443. Since the court had determined in its double jeopardy ruling that the federal government was "not a party or privy to the state litigation, the principles of collateral estoppel [did] not preclude it from litigating issues litigated in the state case." Slip op. at 16.

Defendants took an interlocutory appeal from the court's adverse ruling under *Abney v. United States*, 431 U.S. 651 (1977); however, the court proceeded to trial after ruling that the appeal was frivolous. In an unpublished order of July 11, 1980 (627 F.2d 1093 (6th Cir. 1980)), the court of appeals found no double jeopardy, applying the "dual sovereignty" doctrine. Slip op. at p.5. On appeal from the trial conviction, the court of appeals concluded that "the district court had jurisdiction to proceed, having determined that the interlocutory appeal lacked any 'colorable foundation'." *United States v. Lanci*, Nos. 80-5239 and 80-5246 (6th Cir. filed January 12, 1982), slip op. at 5.

Defendants, including defendant Liberatore whose state prosecution occurred subsequent to this court's [11] October 10, 1979 order, have failed to bring to this court's attention any new law or new facts which would alter its prior holding. The doctrine of dual sovereignty continues to apply, and this court holds that the prosecution of defendants under the RICO statute is not barred by their previous state prosecutions.

III.

Double Jeopardy—Prior Federal Prosecution

In *United States v. Turkette*, 49 U.S.L.W. 4743 (June 17, 1981), the Court concluded that "neither the language

nor structure of RICO limits its application to legitimate 'enterprises' " and that "[a]pplying it also to criminal organizations does not render any portion of the statute superfluous nor does it create any structural incongruities within the framework of the Act." In the present case, as in *Turkette*, a section 1962(d) conspiracy to violate section 1962(c) is charged; and the defendants are charged in the indictment with "being associated with an enterprise engaged in and the activities of which affected interstate commerce, that is, a group of individuals associated in fact. . . ." It is instructive, therefore, to look at the elements (apart from proof of the conspiracy) which *Turkette* holds must be proved in a RICO conspiracy case.

Referring to section 1962(c), the violation of which is charged as the object of the conspiracy, the Court declared in order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." It held that the element of an **[12]** "enterprise," "for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct," is proved "by evidence of an ongoing organization, formal or informal, and the evidence that the various associates function as a continuing unit." The Court further held that "[t]he 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages." A pattern of racketeering is "proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise."

Defendants argue that their prior federal prosecution under Counts II-IV bars prosecution on the RICO count. Again, the basis for their position is the statutory requirement of section 1962(c) and, hence, section 1962(d), of

a showing of "a pattern of racketeering activity." See part II, *supra*, at p.7. 18 U.S.C. §1961(1)(B) defines "racketeering activity" as "any act which is indictable under any of the following provisions of Title 18, United States Code: Sections 201 (relating to bribery). . . ." Defendants argue that the prior federal prosecution of the bribery counts bars on double jeopardy grounds the current retrial of those acts to support the RICO count.

The Fifth Amendment protects a criminal defendant from being held twice in jeopardy for committing the *same* offense. In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court set forth a test for determining [13] whether there is in reality one, or more than one, offense in issue:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304. There is nothing in the *Blockburger* test, or the double jeopardy clause, which bars the trial of a defendant for two offenses which arise out of one criminal overt act or conspiracy even if substantially the same facts are used to prove each offense. *United States v. DePalma*, 461 F.Supp. 778, 781 (S.D.N.Y. 1978). The inquiry to be undertaken is one of statutory intent, *i.e.*, an inquiry into whether Congress intended to establish two separate offenses. The *Blockburger* test "is a rule of statutory construction, not a constitutional talisman." *Whalen v. United States*, 445 U.S. 684, 708 (1980) (Rehnquist, J., dissenting). *See also Iannelli v. United States*, 420 U.S. 770, 784, n.17 (1975) ("The test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), serves a . . . function of iden-

tifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction.")

The purpose of the Organized Crime Control Act of 1970 was stated thus:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by *strengthening* the legal tools in the evidence-gathering process, by establishing *new* penal prohibitions, and by providing *enhanced* sanctions and *new* remedies to deal with the unlawful activities of those engaged in organized crime.

[14] [1970] U.S. Code Cong. & Admin. News 1073, 1073 (emphasis added). The clear import of the above language is that RICO was enacted as a separate offense to serve as an additional tool for law enforcement bodies to use in combatting organized crime. *United States v. Boylan*, 620 F.2d 359, 360 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). The language in no way suggests that the Act was designed to replace or supercede criminal acts already proscribed.

Congress listed as part of its statement of findings:

> (5) organized crime continues to grow . . . because the sanction and remedies available to the Government are unnecessarily limited in scope and impact.

Id. RICO was enacted to broaden the scope and impact of the sanctions and remedies available to the government in its attempt to curtail organized crime.

For a court to conclude that the government must choose between prosecuting a defendant on a RICO charge or on a predicate act would undermine the stated purposes and scope of the Act. Under such conditions, "[a] con-

viction under RICO would, in fact, grant immunity for the offenses charged in the 'pattern of racketeering'," *United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946 (1980), or a conviction on a predicate crime would bar a later RICO conviction. That the latter was not intended is apparent from the statute itself. The complete definition of "pattern of racketeering activity" reads:

> [15] "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (*excluding any period of imprisonment*) after the commission of a prior act of racketeering activity.

18 U.S.C. §1961(5) (emphasis added). "It is implicit in that provision that even though a defendant has already served time for the first predicate offense that first offense may still be used as an element in establishing a RICO 'pattern'." *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *Accord*, *United States v. DePalma*, 461 F.Supp. 778, 786-87 (S.D. N.Y. 1978).

It is apparent to this court that in enacting 18 U.S.C. §1961, *et seq.*, Congress intended to establish criminal offenses separate and apart from the predicate crimes underlying the "pattern of racketeering activity." Because the offense charged under 18 U.S.C. §1962(d) is thus separate from the offense litigated in the prior trial, 18 U.S.C. §201, *et seq.*, defendants' motions to dismiss based upon claims of double jeopardy are overruled.

Limiting the motions of the defendants to the issue of traditional double jeopardy—apart from the collateral estoppel issue considered in part V, *infra*—the previous

federal bribery prosecution and particularly the convictions of defendant Liberatore, Lanci, and Ciarcia do not warrant application of the double jeopardy clause.

[16] IV.

Collateral Estoppel—Prior Federal Prosecution

Defendants argue that the doctrine of collateral estoppel bars the government from relitigating the factual bases of any of the federal counts on which they were acquitted. They rely upon *Ashe v. Swenson*, 397 U.S. 436 (1970), *United States v. Mespoulede*, 597 F.2d 329 (6th Cir. 1979), and *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972), to support their positions.

In *Ashe* petitioner had been charged, along with three other men, in the robbery of six poker players. He was tried for the robbery of one of the players, Knight, and acquitted by the jury as "not guilty due to insufficient evidence." Six weeks later petitioner was tried for the robbery of another participant, Roberts, the trial court having overruled his motion to dismiss. Petitioner was found guilty. The conviction was affirmed through the state appeals process. The district court and court of appeals affirmed the conviction in petitioner's habeas corpus proceeding.

The Supreme Court reversed, holding that the doctrine of collateral estoppel is embodied in the Fifth Amendment's guarantee against double jeopardy: "For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." 397 U.S. at 445-46 (citations omitted). There was no question that petitioner could have been charged with six offenses and, if found guilty, given six punishments. The question [17] was whether,

"after a jury determined by its verdict that petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate the issue again." *Id.* at 446.

The Court set forth the line of inquiry to be undertaken by the trial court:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Id. at 444 (citations omitted).

United States v. Mespoulede, supra, is instructive as an application of *Ashe.* The court reasoned that "[a]t the outset . . . the defendant must carry the burden of proving that the fact-finder acquitted him because it resolved in his favor the very issue that he seeks to foreclose from consideration in the second trial." 597 F.2d at 333. The court looked to the pleadings, evidence, and charge in the prior trial, determining that if after such examination the conclusion is reached that the defendant is being forced to "defend against charges or factual allegations that he overcame in the earlier trial," the doctrine of collateral estoppel is applicable. *Id.* at 335.

This court begins its analysis then by determining what issues the jury resolved in defendants' favor [18] in the prior federal prosecution. Count II (Count I at the trial because the original Count I, the RICO count,

had been severed) charged defendants with conspiring to violate 18 U.S.C. §201(b)(3) by "giv[ing] things of value to Jeffrey Rabinowitz . . . and to Geraldine Rabinowitz. . . ." The government alleged ten overt acts taken in furtherance of the conspiracy; among those acts was the giving and loaning of $1,000 to Geraldine Rabinowitz and the giving and loaning of approximately $15,000 to Geraldine and Jeffrey Rabinowitz.

Count III of the indictment (Count II at trial) charged defendants with violating 18 U.S.C. §201(b)(3), "[i]n or about June or July 1977," by "giv[ing], offer[ing] and promis[ing] things of value, to Jeffrey Rabinowitz . . . and to Geraldine Rabinowitz . . . with the intent to induce Geraldine Rabinowitz . . . to do an act in violation of her lawful duty in respect to the disclosure of confidential information contained in the official files and records of the Federal Bureau of Investigation." Count IV (Count III at trial) charged in the same language a violation of section 201(b)(3) "in or about October, 1977."

Pertinent at this point is the court's charge on Counts III and IV since the government does not include Count II as a predicate act in the current RICO claim.[6] The court set forth the three elements that the United States was required to prove:

> [19] The first element the United States must prove is that "in or about June or July 1977," the particular defendants under consideration separately or jointly, gave, offered, or promised anything of value to Geraldine Rabinowitz, or to her and Jeffrey Rabinowitz, or to him on her behalf.
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6. Of the current defendants, only Licavoli and Liberatore remained on counts III and IV at the time of the charge; defendant Calandra remained on count IV. See p.5, *supra*.

> The second element that the United States must prove is that in giving, offering, or promising a thing of value to Geraldine Rabinowitz, or to her and Jeffrey Rabinowitz, or to him on her behalf, the particular defendant under consideration acted willfully, knowingly, and corruptly.
>
> * * * * *
>
> The third element that the United States must prove is that in giving, offering, or promising a thing of value to Geraldine Rabinowitz, or to her and Jeffrey Rabinowitz, or to him on her behalf, the particular defendant under consideration acted with the specific intent to induce Geraldine Rabinowitz, an employee of the Federal Bureau of Investigation, to do an act in violation of her lawful duty with respect to the disclosure of confidential information contained in the official records and files of the Federal Bureau of Investigation.[7]

A verdict of not guilty was required under circumstances set forth:

> Should you find that with respect to the particular defendant under consideration that the United States has failed to prove by evidence beyond a reasonable doubt any one or more of the three elements of the offense of bribery as charged in Count II as I have defined and explained these elements to you, and should you find that the United States has failed to prove the particular defendant under consideration guilty by the alternative method of proof I have just explained, you will then return a verdict of not guilty as to that particular defendant.

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7. In the charge the court set forth an alternative to this method of proof which would be applicable to any defendant found guilty on count II, the conspiracy to violate section 201(b)(3).

The elements of Count IV (Count III at the trial) were set forth in identical language except that the [20] government was required to prove that the events took place "in or about October 1977." A verdict of not guilty was required under circumstances identical to those set forth in relation to Count III as quoted above.

In the upcoming trial, the government must prove the commission of at least two predicate acts by each defendant in order to prove that defendant's participation in a "pattern of racketeering activity."[8] As stated earlier, Count I sets forth five predicate acts to support the alleged "pattern of racketeering," two of which are the bribery acts alleged in Counts III and IV of the indictment, the counts litigated in the prior federal prosecution. The government will have to prove, as to the predicate bribery crimes, the same three elements it was required to prove as to those charges in the prior trial.

Yet the jury in its acquittals and the court in granting the directed verdict motions resolved those factual elements in favor of the defendants (except for the jury's finding defendants Liberatore and Lanci guilty on Counts II and IV (Counts I and III at the trial). Defendants Licavoli, Liberatore (as to Count III), Calandra, Cisternino, Carabbia, and Lanci (as to Count III) are "once again faced with criminal sanctions that, realistically, may be imposed in large part because the second jury is persuaded that [they committed the [21] alleged acts of bribery]." *Mespoulede*, 597 F.2d at 335. The government may not impose upon defendants a second time the burden of defending against the identical charges, once acquitted. Under *Ashe v. Swenson* the government is collaterally estopped from introducing evidence as to those acts on

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8. For discussion of this requirement, see pages 21-23, *infra*.

which defendants were acquitted in their prior federal prosecution.

The government attempts to avoid a collateral estoppel bar by arguing that because RICO "provide[s] a new criminal objective for a conspiracy by defining a new substantive crime, . . . it is irrelevant that each defendant did not agree/conspire to commit each of the predicate acts." The government relies upon *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom. Delph v. United States*, 439 U.S. 953 (1978), and *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981).

Indeed those cases do hold that "a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense." *Sutherland*, 656 F.2d at 1194. This does not mean that the government can prove the two predicate acts as to one defendant by showing that these acts were committed by other members of the alleged conspiracy. The statute is clear that a person charged under section 1962(c), and hence section 1962(d), must have conducted or participated in the conduct of the defined enterprise's affairs "through a pattern of [22] racketeering activity," i.e., through the commission of two or more predicate acts. *Elliott* states:

> To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*. One whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the Act.

571 F.2d at 903.

The government is not barred by this court's holding from proving the alleged bribery acts as predicate crimes committed by persons not previously acquitted on Counts III and/or IV (Counts II and III at trial) in the prior prosecution. The government may not attempt to establish the alleged bribery acts as predicate crimes against those defendants previously acquitted of those bribery acts; instead, it must establish against those defendants two other predicate acts.

The government argues that "the constant reliance by the Defendants upon the 'facts' that they, personally, did not conspire with those convicted to bribe the FBI clerk" is inadequate to invoke collateral estoppel and close the awesome door of finality upon these issues relevant to the "enterprise." Quoting from *Elliott*, 571 F.2d 902-04, the government urges that because "some of [the *Elliott*] defendants did not commit nor even know of the commission of some of the predicate offenses . . . did not remove those portions of the indictment [23] from consideration against them under a RICO conspiracy enterprise charge."

In *United States v. Sutton*, 642 F.2d 1001, 1017 (6th Cir. 1980), the Sixth Circuit, sitting *en banc*, rejected the panel's belief that it was necessary to show that all defendants engaged in each of the predicate acts shown to have occurred. In support, the court quoted with approval language from *Elliott*, 571 F.2d at 902-03:

> The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's

> affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.

All *Elliott* stands for, material here, is that it need not be shown that all participants committed the same acts of racketeering. But it must be shown that each defendant committed at least two predicate acts of racketeering activity, while not the same two acts as another defendant.

However, the government is permitted to prove predicate acts of racketeering activity in addition to those charged in the indictment. In a conspiracy case, overt acts, in addition to those charged in the indictment, may be proved. *See Brulay v. U.S.*, 383 F.2d 345, 350-51 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967). By analogy it is concluded in a RICO conspiracy [24] case that the government is permitted to prove predicate acts of racketeering activity in addition to those charged. But this does not relieve the obligation of the government through the indictment to assert at least two predicate acts as to each defendant.

V.

Defendant Calandra raises a number of additional arguments attacking the sufficiency of the indictment and asserting that the indictment is unconstitutionally vague.

A.

Defendant asserts first that the conspiracy to murder Nardi and the conspiracy to murder Greene must be struck as predicate acts because "a conspiracy is an agreement, a mental state, standing alone it is not a sufficient act in law to impose liability on anyone." He supports his argument by relying upon O.R.C. §2923.01(B), which requires that an overt act in furtherance of a conspiracy

be alleged and proved. Defendant appears to define the word *conspiracy* as an agreement alone and argues that only when an overt act is added to it does a crime occur.

It is true that the State conspiracy law requires proof of an overt act. The crime of conspiracy under O.R.C. §2923.01(A)(2) and (B) consists of an agreement plus a "substantial overt act" done by the defendant "or a person with whom he conspired" in furtherance of the conspiracy. It is the combination of the agreement and overt act which brings about the "act" which is [25] defined as conspiracy and proscribed by law. Under Ohio law the crime of conspiracy is not an agreement alone but is an agreement coupled with an overt act. Hence, this court does not agree with defendant's assertion that a conspiracy is "a mental state."

This court does not find within the definition of "racketeering activity" in section 1961(1) any suggestion that Congress intended to exclude conspiracies. Section 1961(1)(A) relating to crimes chargeable under state law speaks of "any act or threat *involving* murder, kidnaping, gambling. . . ." (Emphasis added.) The subsection does not say "any act or threat *of* murder. . . ." The term "involving" suggests a broader scope and an intent to include other acts in addition to the substantive crime. This broad reading of an "act" includes the crime of conspiracy, which under Ohio law, as seen, requires an overt act to complete the crime.

Section 1961(B) sets forth specific federal statutes, violations of which will constitute an act of racketeering activity. Among those statutes is 18 U.S.C. §1511, which makes it "unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business. . . ." 18 U.S.C. §1511(a).

The inclusion of this conspiracy statute indicates that there was no philosophical aversion to the use of a conspiracy as a predicate act and indeed an intent to include it.

[26] Section 1961(D), which, like section 1961(A), is written in generic terms, has been found to include conspiracies. In *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), the court held that "conspiracy can properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in section 1961(1)(D)." *Id.* at 1123.[9]

Consistent with the congressional intent of giving law enforcement authorities the necessary tools with which to fight organized crime, this court determines that a conspiracy may be charged as a predicate act under section 1961(A).

B.

Defendant Calandra argues that the conspiracy to murder Greene and the murder of Greene cannot be considered as separate predicate acts because under O.R.C. §2923.01(b) those acts merge upon conviction of the sub-substantive crime. It is clear that the purpose of subsection (G) is to prevent a court from imposing double sentences for conspiracy and the substantive act, and thus the provision has no application to the current situation. Of course, the court reserves for trial the questions of whether the government has proved both a conspiracy and the substantive act. Also reserved **[27]** is the question of whether if those are the *only* two predicate acts proved, those acts can constitute a "pattern of racketeering activity" within the intent of the statute.

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9. The court agrees with the determination in *Weisman* that the omission of the general conspiracy statute, 18 U.S.C. §371, from section 1961(B) exhibits intent to limit "acts" to the specific provisions delineated.

C.

Defendant Calandra next argues that "the indictment does not comply with the substantive requirements of the Ohio statute (2923.01) that it seeks to incorporate" in that the government failed to allege specific overt acts taken in furtherance of the conspiracies to murder Nardi and Greene. The argument is not well taken as it pertains to the Greene conspiracy. The government has alleged overt acts related thereto in sections 2-7.

However, even if no overt acts had been alleged as to Greene and even though none have been alleged as to Nardi, the court does not find the indictment defective. There is nothing in section 1962(c) or (d) which requires the indictment to charge all of the elements of a state predicate crime. This criminal prosecution is for the violation of a federal criminal statute. The defendants have not been charged with commission of the state crimes; they cannot be convicted of the state crimes. The state crimes referred to are definitional only. *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied sub nom. Millhouse v. United States*, 434 U.S. 1072 (1978). As such, the government will be required to prove those acts according to the elements required by state law. [28] Hence, the government will have to prove at trial that overt acts were taken in furtherance of the alleged conspiracy agreements. This does not mean, however, that the government is required to set forth in the *federal* indictment pertaining to the *federal* charge the elements of the state law predicate acts.[10]

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10. It is relevant here to note that courts permit great flexibility in the proof of overt acts. "Evidence of overt acts which occurred after a conspiracy was formed and which were related to the object of the conspiracy is admissible regardless of whether the overt acts are charged in the indictment. . . . [A] conviction

(Continued on following page)

D.

Because Ohio had no general conspiracy law in 1970 when RICO was enacted, defendant argues, the language "chargeable under state law" could not include section 2923.01. The court disagrees. Section 1961(A) does not say "*presently* chargeable under state law." The critical question is whether the acts alleged were proscribed by state law at the time they were committed. There can be no disagreement that the conspiracy statute was in existence at the time the conspiracies listed as predicate acts allegedly occurred.

E.

Defendant's argument that the indictment is unconstitutionally vague is thus summed up: "In short, how can the government expect this citizen to defend against [29] the charge that he conspired to associate with a RICO conspiracy through the commission of two conspiracies?" Defendant's concern "is compounded by the protected nature of the activity which is apparently the subject of the offense - i.e. associational rights."

To the extent defendant is asserting that the RICO statute is unconstitutional because it punishes associational status, defendant's argument must fail. RICO's "proscriptions are directed against conduct, not status." *United States v. Elliott, supra.* Furthermore, "[r]equiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection

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Footnote continued—

for conspiracy may rest on proof of an overt act not charged in the indictment. It is not necessary for the government to prove each overt act alleged." *United States v. Harris*, 542 F.2d 1283, 1300 (7th Cir. 1976), *cert. denied sub nom. Clay v. United States*, 430 U.S. 934 (1977).

to those who might otherwise be convicted through guilt by association." *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981).

To the extent that defendant is arguing a conspiracy cannot be an act under section 1961, the court has held contrary in part V.A., *supra*. The government must prove that defendants conspired to conduct or participate in the affairs of an enterprise, which they willingly joined, through the commission of at least two acts of racketeering activity. As to a particular defendant and as to the RICO conspiracy charged, the government must prove that said defendant committed at least two predicate acts. As to the conspiracies charged as predicate acts, the government must prove that said defendant agreed to murder Nardi and/or Greene and that some member of the conspiracy carried out one or more overt acts in furtherance of that agreement. [30] Viewed in such a way, the court concludes that the statute is not unconstitutionally vague.

For the above stated reasons, defendants' motions to dismiss or to exclude evidence are granted on the ground of collateral estoppel and overruled on all other grounds.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed March 5, 1984)

82-3509/3606/3498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY LIBERATORE, JAMES T. LICAVOLI,
Defendant-Appellant.

ORDER

Before: MERRITT and KENNEDY, *Circuit Judges;* and PRATT, *District Judge.**

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

/s/ JOHN P. HEHMAN
Clerk

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*Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

STATUTORY PROVISION INVOLVED

18 U.S.C. Section 201(b)(3)

Bribery of public officials and witnesses

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty—

> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. Section 371

Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1961

CRIMES AND CRIMINAL PROCEDURE

§ *1961. Definitions*

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any or the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (re-

lating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable

under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so

designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962

RACKETEER ORGANIZATIONS

§ *1962. Prohibited activities*

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an

unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Nos. 83-1573, 83-1657 and 83-1801

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN P. CALANDRA, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES T. LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LIBERATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d).

2. Whether the trial court erred in denying petitioner Licavoli's motion for a severance.

3. Whether the trial court's evidentiary rulings were correct.

4. Whether the trial court correctly instructed the jury concerning the predicate offenses of conspiracy and murder.

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JOHN P. CALANDRA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (83-1573 Pet. App. A1-A26) is reported at 725 F.2d 1040. Relevant opinions

of the district court (83-1573 Pet. App. A27-A57, A60-A79; 83-1657 Pet. App. A26-A72; 83-1801 Pet. App. A38-A63) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1984. A petition for rehearing filed by petitioner Calandra was denied on February 17, 1984, and his petition for a writ of certiorari (No. 83-1573) was filed on March 23, 1984. On March 6, 1984, Justice O'Connor extended the time within which petitioner Licavoli could file a petition for a writ of certiorari to and including April 8, 1984 (a Sunday), and his petition (No. 83-1657) was filed on April 9, 1984. A petition for rehearing filed by petitioner Liberatore was denied on March 5, 1984, and his petition for a writ of certiorari (No. 83-1801) was filed on May 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Two sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 and 1962, are reproduced at 83-1573 Pet. App. A82-A86.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners and three co-defendants, Pasquale Cisternino, Ronald Carabbia, and Kenneth Ciarcia, were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioner Licavoli was sentenced to ten years' imprisonment. Petitioners Calandra and Liberatore were each sentenced to 14 years' imprisonment.[1]

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[1] Co-defendants Cisternino and Carabbia were each sentenced to 12 years' imprisonment; co-defendant Ciarcia was sentenced to ten years' imprisonment.

1. The evidence at trial showed that between 1976 and 1978 petitioner Licavoli was a leader of organized crime in Cleveland, Ohio; petitioners Calandra and Liberatore played supervisory roles and co-defendants Carabbia, Cisternino, and Ciarcia played subsidiary roles in the organization. Throughout this period, petitioners and their co-defendants sought to establish control over criminal activities in the area by means of murder, wiretapping, and bribery. Pet. App. A2-A3.[2]

a. In the spring of 1976, Licavoli decided to have Danny Greene killed in order to eliminate competition from Greene's criminal activity in the West Cleveland area. Licavoli had a colleague, James Fratianno, contact Raymond Ferritto for the purpose of hiring him to murder Greene (Tr. 1662-1663). After a series of meetings with Licavoli, Calandra, and several of the co-defendants, Ferritto traveled to Cleveland to stalk Greene and, with the aid of Cisternino and Carabbia, to determine his pattern of activities. In August 1977, Ferritto asked Licavoli for money to cover his expenses. Licavoli replied that he would speak with Calandra, who would provide Ferritto with some money. Several days later, in the presence of Calandra, Carabbia gave Ferritto $5,000 to defray expenses he had incurred. Licavoli also promised Ferritto that when the murder was accomplished Ferritto would receive 25% of the proceeds of gambling activities in the Warren and Youngstown areas. Pet. App. A3; Tr. 1725-1726, 1734-1735, 2333-2334. During September 1977, Ferritto and Cisternino attempted unsuccessfully to kill Greene by placing a bomb outside the door of his apartment (Tr. 1751-1757, 2378-2379).

During the same period, Liberatore and an associate, Thomas Lanci, recruited Louis Aratari, an ex-convict who worked for Liberatore, to "tak[e] Danny Greene out with a gun" (Tr. 3115) and to murder five of Greene's

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[2] "Pet. App." refers to the appendix to the petition in No. 83-1573, unless otherwise indicated.

henchmen, including his son (Tr. 3199-3202, 6574). Aratari agreed to commit the murders for $5,000 each and a share in the proceeds of the gang's activities (Tr. 3200-3202). He and a partner, Vic Guiles, then began to stalk Greene. At one point, Liberatore and Calandra showed Aratari some of the places Greene frequented, including his "headquarters" (Tr. 3122-3126). Calandra explained on that occasion that "the other two guys," Ferritto and Carabbia, needed a "back-up team" because, whenever they were in front of a location, Greene would leave by the back (Tr. 3124). Calandra arranged for Ferritto to meet Aratari at a hotel, where they discussed strategies for killing Greene and agreed that Aratari and Guiles would serve as the back-up team for Ferritto and Carabbia (Tr. 1766, 2338-2344, 3139-3147). Thereafter, the two teams made plans to kill Greene when he left or entered his apartment building and to murder his associates with a hand grenade (Tr. 3267-3270, 4911-4913).

On Monday October 3, 1977, Carabbia called Ferritto and set up a meeting for the following day with Licavoli, Calandra, and Cisternino (Tr. 1760-1763, 2354-2355). At the meeting, the defendants, who had wiretapped Greene's telephone, played a recording of Greene's girlfriend making a dental appointment for him for the following Thursday (Tr. 1764-1765, 2355-2356). On Wednesday Carabbia met with Aratari and Guiles. He explained that he had an "inside lead on Danny Greene" and that Greene would be going to the dentist the next day. Tr. 3342, 4933.

On the date of Greene's dental appointment, Cisternino and Ferritto constructed a bomb. Ferritto then drove to the vicinity of the dentist's office with the device in his car; Carabbia followed in a second car with a box into which the device was to be placed. Aratari and Guiles, armed with a high powered rifle, arrived in another car supplied by Ciarcia. The plan was for Guiles to shoot

Greene if possible, with the bomb as a back-up measure. Pet. App. A4.

When Greene arrived for his appointment and entered the dentist's office, Guiles had no opportunity to shoot him. When a parking space opened next to Greene's car, Ferritto placed the bomb in the box on the side of Carabbia's car and parked that vehicle next to Greene's car. When Greene emerged from his appointment, Ferritto and Carabbia drove away in Ferritto's car, and Carabbia detonated the bomb with a remote control device. Pet. App. A4-A5; Tr. 1795-1800, 2370-2372. Greene died as a result of the explosion, and Greene's and Carabbia's cars were destroyed (Tr. 2944, 4597, 4624). The following day, in a conversation intercepted by law enforcement authorities pursuant to a court order, Calandra and Licavoli discussed the bomb and the need to watch out for one of Greene's henchmen (GX 120).

b. During the period covered by the indictment, Geraldine Rabinowitz worked as a file clerk in the Cleveland office of the FBI. Her future husband worked at an automobile dealership where Ciarcia was sales manager (Tr. 538-539). In the spring of 1977, Ciarcia asked that Rabinowitz obtain confidential FBI information concerning investigations of himself, Licavoli, or Liberatore (Tr. 213-214). After some initial hesitation, Rabinowitz furnished Ciarcia with an investigative report on Licavoli (Tr. 214-215, 217-218). Ciarcia showed the documents to Liberatore and made photocopies for him (Tr. 6531-6539). Rabinowitz subsequently agreed to obtain the names of the informants who had furnished the information contained in the report (Tr. 225-229, 243-244). She also furnished Ciarcia and Liberatore with confidential information about wiretaps, license plate numbers of FBI surveillance vehicles, and identities of other informants (Tr. 244-260). During this period Ciarcia promised that he would assist Rabinowitz in obtaining a downpayment on a house for her and her husband (Tr. 313, 549-

550). Liberatore later delivered $15,000 in cash to Rabinowitz to cover the downpayment (Tr. 593-598, 604-609). No interest or schedule of repayment for the loan was set, and no provision was made for collateral (Tr. 916-917).

2. Before the trial in this case, petitioners and their co-defendants were tried in state court for aggravated murder. Cisternino, Carabbia, and Ciarcia were convicted, while Licavoli and Calandra were acquitted; the jury was unable to reach a verdict in the trial of Liberatore.

In May 1979, petitioners, their co-defendants, and Thomas Lanci were charged in a four-count indictment by a federal grand jury (83-1801 Pet. App. A27-A37). Count 1 was the racketeering conspiracy charge at issue in this case. The alleged underlying predicate acts included, inter alia, conspiracy to murder Daniel Greene, murder and aiding and abetting the murder of Greene, and bribery of an FBI employee.[3] The indictment also charged the defendants with conspiracy to commit bribery and with two counts of bribery, based on the scheme to obtain FBI information from Geraldine Rabinowitz. The district court severed the bribery and bribery conspiracy counts and set them for trial first. Licavoli and Calandra were acquitted at that proceeding. Liberatore was convicted on the bribery conspiracy count and on one of the two substantive bribery counts.[4]

The district court then proceeded to trial on the racketeering conspiracy count. Prior to trial, the court ruled that the acquittal of Licavoli and Calandra on the bribery charges barred the government from relying on acts of

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[3] Count 1 also alleged that the defendants conspired to murder Greene's associate, John Nardi. However, the district court ruled that this scheme was part of a single conspiracy to murder. Pet. App. A47-A54.

[4] Ciarcia pleaded guilty to the bribery counts; Lanci was convicted on two of the counts; Cisternino and Carabbia were acquitted.

bribery to support the racketeering conspiracy charge against them, leaving murder and conspiracy to commit murder as the only remaining predicate acts in their cases. 83-1801 Pet. App. A51-A58.[5] The court denied the motion of Licavoli and Calandra to sever their cases, but instructed the jury that it should not consider any testimony by Rabinowitz in connection with the case against Licavoli and Calandra.

At the close of the government's case, and again following their convictions, petitioners filed motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. The court denied those motions, rejecting arguments that a conspiracy to commit murder cannot constitute a predicate racketeering act under 18 U.S.C. 1961 and that the offenses of murder and conspiracy to commit murder cannot constitute separate racketeering predicate offenses because they merge upon conviction for the former offense under Ohio law (Pet. App. A27-A57). See also 83-1657 Pet. App. A42-A72.

3. The court of appeals affirmed (Pet. App. A1-A26). It rejected petitioners' claims that conspiracy to murder could not constitute a racketeering predicate offense and that murder and conspiracy to commit murder could not constitute separate racketeering predicate offenses (*id.* at A6-A12). The court also held (*id.* at A12-A13) that double jeopardy and collateral estoppel principles did not bar the use of murder as a predicate offense for the RICO prosecution, even though petitioners Licavoli and Calandra had been acquitted in state court, citing *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). In addition, the court rejected the contention of Licavoli and Calandra that the district court erred in denying their motion for a severance and

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[5] The district court ruled (83-1801 Pet. App. A55) that in Liberatore's case principles of collateral estoppel required dismissal of the RICO predicate act that arose out of the same conduct as the substantive bribery charge on which he had been acquitted.

that they were prejudiced by evidence offered against their co-defendants concerning the bribery of Geraldine Rabinowitz (Pet. App. A20-A23).

The court of appeals also rejected claims that prior testimony of Ferritto should not have been admitted at trial (Pet. App. A13-A17); that double jeopardy principles barred the government from using bribery as a RICO predicate offense (*id.* at A18-A20); and that the district court erred in refusing to excuse a juror who discovered during the trial that he was acquainted with a government witness (*id.* at A23-A24). The court summarily rejected petitioners' claims that they were prejudiced by various evidentiary rulings, including admission of co-conspirator statements, references to court-ordered electronic surveillance of Licavoli, and references to participation of government witnesses in the Witness Protection Program (*id.* at A20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

1. Petitioners advance a number of different theories in support of their contention (83-1573 Pet. 5-19; 83-1657 Pet. 19-30; 83-1801 Pet. 9-20) that they could not be convicted of racketeering conspiracy.

a. Petitioner Calandra contends (83-1573 Pet. 5-10) that, because he was acquitted in state court of the murder of Greene, principles of double jeopardy and collateral estoppel preclude use of that murder as a predicate offense supporting his racketeering conspiracy conviction. The court of appeals properly rejected this contention (Pet. App. A12-A13).

It is settled law that an acquittal in state court does not bar a subsequent prosecution based on the same conduct in federal court. See *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978); *Rinaldi* v. *United States*, 434

U.S. 22, 28 (1977); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 128-139 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922). As the Court explained in *Lanza* (*id.* at 382), "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The * * * double jeopardy * * * forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[6]

The Third Circuit, in *United States* v. *Frumento*, 563 F.2d 1083, 1087 (1977), cert. denied, 434 U.S. 1072 (1978), rejected a claim virtually identical to that raised here. The court correctly noted in *Frumento* that the RICO statute does not punish the same crimes as state law. Instead, 18 U.S.C. 1962 establishes a federal crime—racketeering—that is merely defined in part by reference to state law crimes. Moreover, it is most unlikely that Congress would have wished an acquittal in state court to bar a federal racketeering prosecution based on the same offense. If that were the rule, federal prosecutions could be defeated by ineffective prosecution or even corrupt collusion by state officials, or by state procedural nuances, such as restrictive evidentiary rules.[7]

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[6] Thus, contrary to petitioner Calandra's contention (83-1573 Pet. 7), the principle that barred use of the federal bribery offenses of which he had been acquitted was inapplicable to the state murder charge.

[7] Relying on *Bartkus* v. *Illinois*, *supra*, petitioner Liberatore contends (83-1801 Pet. 16-20) that the dual sovereignty principle is inapplicable here because of pervasive federal involvement in the state prosecution. Since Liberatore was not acquitted of Greene's murder (because the jury was unable to reach a verdict in his case), double jeopardy principles would not bar his reprosecution. See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Moreover, although the Court noted in *Bartkus* that the state prosecution there was not a "sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution" (359 U.S. at 124), it clearly did not mean thereby to restrict coopera-

b. Petitioners also claim (83-1573 Pet. 10-15; 83-1657 Pet. 26-30; 83-1801 Pet. 9-12) that, by virtue of the operation of Ohio law, the government failed to prove two separate predicate acts of racketeering activity. A conviction under RICO requires proof of the commission of, or conspiracy to commit, at least two acts of racketeering activity. See 18 U.S.C. 1962(c) and (d); 18 U.S.C. 1961(5).[8] Racketeering activity is defined in 18 U.S.C. 1961(1)(A) as, inter alia, "any act or threat involving murder * * *, which is chargeable under State law and punishable by imprisonment for more than one year * * *." Under federal law, a defendant can be convicted of both a substantive offense and conspiracy to commit that offense. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S.

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tion between federal and state law enforcement authorities in investigating and prosecuting acts that violate the laws of both sovereigns. The district court expressly found (Pet. App. A70-A72) that the federal-state cooperation in this case (which consisted primarily of sharing of evidence and expert witnesses) was not of the type that would convert the state prosecution into a sham or cover for a federal prosecution. See also *Bartkus*, 359 U.S. at 122-123.

[8] 18 U.S.C. 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961(5) provides that, as used in the RICO statute,

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

770, 777-778 (1975). However, Ohio Rev. Code Ann. § 2923.01(G) (Page 1982) provides that

> [w]hen a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

Petitioners contend that, because they could not be convicted in Ohio courts of both the murder of Greene and conspiracy to commit that murder, violations of Ohio statutes prohibiting these offenses cannot constitute separate predicate acts for purposes of the federal racketeering statute.

The court of appeals properly rejected this claim (Pet. App. A9-A12). As the court observed (*id.* at A10, A11), although an individual cannot be convicted of, or sentenced for, both murder and conspiracy to commit murder under Ohio law, those offenses are "separately chargeable under [Ohio] law," and each is "punishable by imprisonment for more than one year."[9] The RICO statute does not require that offenses charged as predicate acts be subject to cumulative punishments under state law. Thus, it is no defense to a RICO charge that an Ohio court could not enter separate judgments or impose cumulative sentences for conspiracy and the related substantive offense.[10]

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[9] The crime of aggravated murder is defined in Ohio Rev. Code Ann. § 2903.01 (Page 1982). The crime of conspiracy to murder is defined in *id.* § 2923.01.

[10] Calandra (83-1573 Pet. 12-14) and Liberatore (83-1801 Pet. 11) err in relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), to support their contention that the murder and conspiracy offenses merged for purposes of the racketeering statute. In *Phillips*, the court held that under 21 U.S.C. 841(a)(1), distribution of marijuana and possession of the same marijuana with the intent to distribute it constituted the same offense when they were both part of a single

Moreover, variations on the relationship between conspiracy and the underlying substantive offense under state law do not control the definition of racketeering acts under federal law. As the court of appeals observed (Pet. App. A11), the reference to state law in the racketeering statute is for the purpose of defining the conduct prohibited. It is not meant to incorporate state procedural rules. See *United States v. Welch*, 656 F.2d 1039, 1058 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Salinas*, 564 F.2d 688, 690-693 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States* v. *Frumento*, 563 F.2d at 1087 n.8A; *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Thus, the fact that petitioners could not be convicted separately for particular offenses in state court does not preclude the use of those offenses as separate predicate acts under the RICO statute, especially since, as noted above (page 10, *supra*),

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act and that they could not be charged as separate acts of racketeering in such circumstances. Here the conspiracy to murder and the murder itself clearly did not constitute a single act. The court in *Phillips* noted that the RICO statute required that each racketeering act constitute a "separate crime[]," but was careful to point out that separate crimes need not "be in the context of independent schemes or objectives" (664 F.2d at 1038). Because conspiracy and the related substantive offense are "separate crimes" under both Ohio and federal law, the rationale of *Phillips* is inapplicable here.

Nor is it of consequence that the reviser's note to the Ohio statute prohibiting complicity (Ohio Rev. Stat. Ann. § 2923.03 (Page 1982)) states that an accomplice is one who solicits, procures, or conspires with another to commit an offense, aids or abets its commission, or causes an innocent or irresponsible person to commit the offense. See 83-1573 Pet. 12. The trial court here did not define the offense of murder in terms of conspiring; rather, it discussed aiding and abetting murder in terms of willful participation in commission of the murder (C.A. App. 564-566). As the court below observed (Pet. App. A10-A11), Ohio has adopted the common law view that conspiracy and the substantive crime are separate offenses, even though it has now chosen to prohibit cumulative convictions and punishments.

conspiracy and the substantive object offense are separate crimes under federal law.[11]

c. Petitioner Licavoli contends (83-1657 Pet. 23-26) that, in any event, 18 U.S.C. 1961(1) does not embrace conspiracy to commit murder as a racketeering predicate offense. The court of appeals properly rejected that contention (Pet. App. A6-A9).

As this Court recently reiterated in *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting

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[11] Licavoli errs in relying (83-1657 Pet. 29-30) on *United States* v. *Mason*, 213 U.S. 115 (1909), to support his contention that merger of the murder and conspiracy offenses under state law should govern the federal racketeering prosecution. In *Mason* the defendants were charged with conspiring to hinder or obstruct federal officers in the exercise of rights secured to them under the law of the United States and with murdering a federal officer as part of the conspiracy. The conspiracy was alleged to violate Rev. Stat. § 5508 (1875 ed.). A companion provision, Rev. Stat. § 5509 (1875 ed.), provided that "if in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." See 213 U.S. at 119. The Court noted (*id.* at 123) that the question before it—the effect of the defendants' acquittal of murder in state court—was a narrow one, involving "an inquiry as to the meaning and scope of § 5509." It held that, because the defendants had been acquitted of murder by the state courts, Section 5509 was inapplicable. The Court reasoned that "[t]he murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them." 213 U.S. at 124 (emphasis in original).

The holding in *Mason* is inapposite in the context of the RICO statute, which does not merely adopt for sentencing purposes "a distinct offense, a crime only against the State" (213 U.S. at 124). Rather, the RICO statute defines criminal activity punishable under federal law by reference to state law to identify the type of activity that is federally prohibited. See *Frumento*, 563 F.2d at 1087 (noting that "[t]he murder at issue in *Mason* did not constitute an offense against the United States").

United States v. *Turkette*, 452 U.S. 576, 580 (1981)), "'[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as exclusive."'" 18 U.S.C. 1961(1)(A) broadly defines as racketeering activity "any act or threat involving murder [or other enumerated generic crimes] which is chargeable under State law and punishable by imprisonment for more than one year." Conspiracy to commit murder, an offense prohibited by Ohio law and punishable by imprisonment for over a year, plainly falls within the literal terms of that section. See Pet. App. A6.

The holding of the court of appeals is in accord with decisions of other courts of appeals, which have concluded that conspiracy can constitute a predicate offense in the context of Section 1961(1)(A) and analogous provisions of the RICO statute. See *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1984) ("conspiracy to commit murder qualif[ies] as a RICO predicate act under Group A, § 1961(1)(A)"); *United States* v. *Welch*, 656 F.2d at 1063 n.32 (the language of subsection A appears to contemplate conspiracy to commit murder); see also *United States* v. *Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) (conspiracy to obstruct, delay, or affect commerce by robbery, extortion or physical violence constitutes a predicate act under 18 U.S.C. 1961(1)(B)); *United States* v. *Phillips*, 664 F.2d at 1015 (conspiracy to import drugs may properly be alleged as a predicate act of racketeering under 18 U.S.C. 1961(1)(D)); *United States* v. *Weisman*, 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980) (conspiracy to commit securities fraud or bankruptcy fraud qualifies as predicate act under Section 1961(1)(D)).[12]

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[12] Licavoli errs in relying on *United States* v. *Bagaric*, 706 F.2d 42, 62 n.17 (2d Cir. 1983), cert. denied, Nos. 82-6911, 82-6925 (Oct.

Licavoli notes (83-1657 Pet. 23-24) that one of the precursors of the RICO statute defined criminal activity as any one of a number of enumerated generic crimes and "any conspiracy to commit any of the foregoing offenses." He contends that omission of the reference to conspiracy in the final version of the statute the following year demonstrates Congress's intent not to make conspiracy a separate act of racketeering (83-1657 Pet. 24). But that omission does not constitute the sort of "clearly expressed" legislative history that would defeat the otherwise "conclusive" effect of the statute's unambiguous language. See *Russello* v. *United States*, slip op. 4, 10. The RICO legislation that was ultimately enacted was significantly different from the bills of the previous year, and the legislative history contains no explanation for the particular omission on which Licavoli relies. See Pet. App. A41. In view of the broad language used in the final version of the legislation, the reference to conspiracy may have been omitted simply because it was regarded as redundant. Moreover, in view of Congress's purpose to reach high-ranking racketeers, as well as "street-level" employees of racketeering enterprises, it seems most unlikely that Congress meant to immunize those who do not personally involve themselves in racketeering activities, but participate only as conspirators. See Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note (provisions of RICO are to "be liberally construed to effectuate its remedial purposes"); *Russello* v. *United States*, slip op. 10-11; *United States* v. *Ruggiero*, 726 F.2d at 919 (legislative purpose of RICO statute

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3, 1983), No. 83-5206 (Oct. 17, 1983), to support his claim that the Second Circuit has limited the reasoning of *Weisman* to conspiracies charged as predicate acts under Section 1961(1)(D). In *United States* v. *Ruggiero*, 726 F.2d at 918-919, 921, the Second Circuit held that its reasoning in *Wiesman* extends to murder conspiracies charged as predicate acts under Section 1961(1)(A).

supports conclusion that conspiracy to murder constitutes an act of racketeering activity under the RICO statute).

d. Petitioner Calandra maintains (83-1573 Pet. 15-19) that, at least as to a racketeering conspiracy charge under 18 U.S.C. 1962(d), conspiracy to murder and the substantive offense of murder cannot constitute the two predicate acts necessary to support a conviction. That claim is without merit.

Contrary to Calandra's claim (83-1573 Pet. 18), it is not redundant for a conspiracy charge to constitute a predicate offense for a violation of 18 U.S.C. 1962(d). As the Second Circuit explained in *United States* v. *Ruggiero*, 726 F.2d at 923, "[a] RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' * * *, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to 'participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" See also *United States* v. *Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981), in which the court explained that a conspiracy may properly constitute a predicate offense in connection with a RICO conspiracy charge because "[t]he essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering."[18]

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[18] The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that the defendants "conspired together to violate 18 U.S.C. § 1962(c) by being associated with an enterprise engaged in activities which affected interstate commerce and the purpose of which was to control the criminal activities in various cities in the Northern District of Ohio by means of murder, bribery, and other activities" (C.A. App. 548). The court further instructed that, as an additional element, the jury must find that "the particular defendant under consideration engaged in a pattern of racketeering activity * * * by knowingly

Nor is it improper to base a RICO conspiracy on two predicate acts of racketeering that consist of conspiracy and the consummated offense. It is axiomatic that a substantive crime and conspiracy are separate offenses for purposes of prosecution and punishment. See *e.g.*, *Iannelli* v. *United States*, 420 U.S. at 777; *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy "poses distinct dangers quite apart from those of the substantive offense" (*Iannelli*, 420 U.S. at 778), including an increased likelihood that the conspiratorial objectives will be attained and that the participants will commit crimes unrelated to the original purpose for which the conspiracy was formed. See *Callanan* v. *United States*, 364 U.S. at 593-594.

The rationale that underlies this principle is particularly apt in this case. The evidence showed that petitioners engaged in a conspiracy lasting over a year and having as its objective not only the murder of a single individual, but the murder of all members of a competing criminal organization. During that period, petitioners and their henchmen planned and attempted various schemes for murdering Greene, each of which seriously jeopardized the safety of others. They recruited

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and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity" (*id.* at 557).

This instruction is more favorable to the defendant than that prescribed by the decisions on which Calandra relies. In *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981), the courts held that, in the context of a RICO conspiracy charge, it was sufficient for the government merely to demonstrate that the defendant agreed to perform at least two predicate acts. See also *United States* v. *Carter*, 721 F.2d 1514, 1531 (11th Cir. 1984). Here the instructions required the jury to find that petitioners willfully committed, or aided and abetted in the commission of, two acts of racketeering activity, not merely that they agreed to the commission of those offenses.

numerous hit men who participated in these schemes. To view the conspiracy to murder Greene merely as part and parcel of the consummated murder for purposes of the federal racketeering statute would be particularly unrealistic on the facts of this case.

In any event, 18 U.S.C. 1961(5) simply requires "two acts of racketeering activity." It does not require that those acts be separated in time or subject matter, or that they involve different participants. See *United States* v. *Phillips*, 664 F.2d at 1038-1039; *United States* v. *Starnes*, 644 F.2d 673, 677-678 (7th Cir.), cert. denied, 454 U.S. 826 (1981); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Because the act of conspiring to commit murder and the act of murder both qualify as racketeering acts under 18 U.S.C. 1961(1), and because conspiracy and the related substantive offense constitute separate illegal acts under both federal and state law, the statutory requirement was satisfied in this case.[14]

e. Finally, petitioner Liberatore urges (83-1801 Pet. 13-16) that, because he previously was convicted of bribery and conspiracy to commit bribery, double jeopardy principles preclude use of the same offenses as predicate acts to support his RICO conspiracy conviction. It is well established, however, that a defendant may be separately convicted and punished for substantive crimes and for a RICO violation that charges those crimes as

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[14] Licavoli also contends (83-1657 Pet. 6) that the court of appeals' statement that "[a]ll that is now required for a RICO offense is the commission of two predicate offenses * * *. No further indicia of 'enterprise' is now necessary" is contrary to this Court's decision in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). In fact, the quoted language is from Judge Merritt's concurring opinion (Pet. App. A26). Moreover, while the Court held in *Turkette* that a racketeering enterprise is distinct, for purposes of proof, from predicate racketeering offenses, it went on to observe that the proof used to establish those separate elements "may in particular cases coalesce." 452 U.S. at 583.

predicate offenses. As the court explained in *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), "[t]he racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions." See also, *e.g.*, *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, No. 82-1225 (Apr. 4, 1983); *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States* v. *Boylan*, 620 F.2d 359, 360-361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).[15]

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[15] Liberatore incorrectly relies (83-1801 Pet. 15) on the decisions of the Fifth Circuit in *United States* v. *Marable*, 578 F.2d 151 (1978), and *United States* v. *Ruigomez*, 576 F.2d 1149 (1978), to support his double jeopardy claim. In those cases, the court addressed the propriety of charging a single continuing drug conspiracy in separate indictments, not the question whether a substantive offense for which a defendant is convicted can also constitute a predicate offense in a RICO prosecution. On the latter issue, the Fifth Circuit is in agreement with the holding of the Ninth Circuit in *Rone*. See *United States* v. *Hawkins*, 658 F.2d at 287.

Liberatore also claims that use of a bribery conspiracy charge as a predicate act in a RICO conspiracy count constitutes multiple prosecution for a single conspiracy (83-1801 Pet. 15-16). That claim is erroneous for the reasons we have stated in response to Calandra's argument concerning a RICO conspiracy prosecution based, in part, on a conspiracy to commit murder. See pages 16-18, *supra*. In any event, as Liberatore acknowledges (83-1801 Pet. 3), the sentence on his racketeering conviction runs concurrently with the sentences imposed on his bribery convictions.

2. Petitioner Licavoli contends (83-1657 Pet. 10-13) that he was prejudiced by the district court's decision not to sever his case from that of his co-defendants. He notes that Geraldine Rabinowitz, the FBI file clerk who received payments from other co-conspirators in exchange for confidential FBI information, mentioned his name during her testimony, although the district court had previously ruled that evidence of the bribery scheme (of which Licavoli had earlier been acquitted) could not be considered against him.

The court of appeals correctly noted (Pet. App. A21-A23) that the general rule in conspiracy cases is that persons indicted together should be tried together, particularly when the offense charged may be established against all the defendants by the same evidence. See, *e.g.*, *United States* v. *Russell*, 703 F.2d 1243, 1247 (11th Cir. 1983); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1116 (1983). That rule applies with full force when all defendants are charged in a RICO conspiracy count, even when, as here, they are not all named in connection with the same alleged predicate acts. See, *e.g.*, *United States* v. *Melton*, 689 F.2d 679, 686 (7th Cir. 1982); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) ("in a case of this nature, it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed"); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir.), cert. denied, 454 U.S. 1082 (1981).

The court of appeals correctly concluded that Licavoli failed to meet the "heavy burden * * * requiring a strong showing of prejudice" (*United States* v. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983)) that is necessary to establish that the district court abused its discretion in denying a severance motion. Here, any potential for prejudice was reduced by the district court's redaction of the FBI

documents to remove references to Licavoli (C.A. App. 467). In addition, as the court of appeals observed (Pet. App. A22), the jury was carefully instructed that evidence of bribery was admissible only against Liberatore and Ciarcia, and there is no reason to believe that it was unable to confine its consideration of Rabinowitz's testimony to those two defendants.[16]

3. a. Following threshold determinations by the district court that petitioners had participated in a conspiracy and that statements made in furtherance of the scheme would be admissible against each of them (see Tr. 1584-1588, 2607, 2609, 2616-2617, 3108-3109), Aratari and Guiles testified about statements of Liberatore concerning the scheme. Several of the statements implicated Licavoli in the conspiracy and tended to show that he was responsible for directing the scheme. See 83-1657 Pet. 14-16. Liberatore did not testify at trial.

Licavoli maintains (83-1657 Pet. 13-18) that admission of Liberatore's out-of-court statements violated both the hearsay rule and the Sixth Amendment Confrontation Clause. This fact-bound claim was properly rejected by the court of appeals (Pet. App. A20).

Under Fed. R. Evid. 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." As Licavoli acknowledges (83-1657 Pet. 14), in order to admit statements of co-conspirators under this Rule it is necessary to show only that the defendant and the declarant were both participants in the conspiracy and that the statements in question were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *United States* v. *James*, 590 F.2d 575, 578 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).

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[16] The trial court repeated the cautionary instruction concerning the evidence of bribery on numerous occasions. See Tr. 15-16, 201, 460-461, 482, 500-501, 539-540, 936-937, 6529-6530; C.A. App. 531, 567, 575, 578.

The district court properly concluded that each of the prerequisites for admission of Liberatore's statements was satisfied. Evidence from other sources showed that Licavoli was instrumental in directing and financing the murder of Greene (see, *e.g.*, Tr. 1677-1680, 1714-1716, 2316-2317, 2333-2335). It also established that, in furtherance of this objective, Liberatore, acting as Licavoli's lieutenant, recruited two hit men and coordinated the efforts of two assassination teams, consisting of Ferritto, Carabbia, Aratari, and Guiles. Liberatore's statements to members of those teams were plainly in furtherance of the scheme.[17]

There is no substance to Licavoli's contention that, even if they fall within the scope of Rule 801(d)(2)(E), admission of the statements violated the Confrontation Clause of the Sixth Amendment. Satisfaction of an exception to the hearsay rule does not automatically fulfill the requirements of the Confrontation Clause. See *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155 (1970). However, the courts are in general agreement that, in most instances, a statement that is admissible under Rule 801(d)(2)(E) will be sufficiently reliable to satisfy the Confrontation Clause, without regard to the declarant's availability for cross-examination. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 256 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Lurz*, 666 F.2d 69, 81 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 1136 (1982); *United States* v. *Peacock*, 654

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[17] In *United States* v. *Lawson*, 523 F.2d 804, 806 (5th Cir. 1975), on which Licavoli relies (83-1657 Pet. 16), the court noted that certain statements contained in wiretaps of telephone conversations admitted against him were made "with the knowledge of and on behalf of" the defendant. Rule 801(d)(2)(E) does not require such proof in connection with any co-conspirator statement. The court in *Lawson* was addressing the defendant's claim that there was insufficient evidence to show that he was a member of the conspiracy. Here there was ample evidence from other sources that Licavoli was a member of the conspiracy.

F.2d 339, 349 (5th Cir. 1981); *United States* v. *Nelson*, 603 F.2d 42, 46 (8th Cir. 1979); *United States* v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); cf. *United States* v. *Perez*, 658 F.2d 654, 660-662 (9th Cir. 1981); *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). If the declarant is found to be a co-participant in a criminal enterprise, he has an incentive to speak truthfully in connection with matters relating to the scheme. See, *e.g.*, *United States* v. *Nelson*, 603 F.2d at 47; *United States* v. *Papia*, 560 F.2d at 836 n.3. Virtually all of Liberatore's statements at issue here concerned the mutual objective of murdering Greene and were made to the hired assassins; therefore, Liberatore had every reason to speak truthfully about Licavoli's desires.

b. Nor is there any substance to Licavoli's claims (83-1657 Pet. 5, 9-10) that the trial court erred in admitting testimony that federal agents had been instructed "to monitor only conversations dealing with criminal activity" and that it improperly vouched for the credibility of government witnesses by instructing the jury concerning the participation of those witnesses in the Department of Justice Witness Protection Program.

The testimony concerning instructions to monitor conversations dealing with criminal activity (Tr. 6017) was in response to cross-examination by the defense suggesting that FBI agents acted unlawfully by indiscriminately intercepting and monitoring Licavoli's calls (Tr. 5971-5972, 5977). Under these circumstances, it was proper for the prosecution to present testimony about the scope of the surveillance warrant and the lawful manner in which it was executed in order to refute the inference of impropriety. Cf. *United States* v. *Jackson*, 509 F.2d 499, 507-508 (D.C. Cir. 1974) (testimony about execution of search warrant properly admitted). Moreover,

the trial court's immediate and comprehensive instruction to the jury concerning this testimony obviated the possibility of prejudice.[18]

During direct examination, the government elicited from several witnesses the fact that they were participants in the Department of Justice Witness Protection Program and had received subsistence allowances and other benefits from the government (see, *e.g.*, Tr. 5043-5044). The trial court subsequently instructed the jury that "[t]hrough the U.S. Marshal Service, the Attorney General of the United States is authorized to provide for the health, safety and welfare of witnesses * * * whenever in the judgment of the Attorney General testimony from or a willingness to testify by such a witness would place his life or person or the life or person of a member of his family or household in jeopardy" (C.A. App. 536). The court cautioned the jury, however, that "any decision to place a witness under the Witness Protection Program is solely an administrative decision in which no court participated" and that such participation bears only on the credibility of the witnesses and "may not be considered as any evidence or inference of guilt as to the acts charged against any of these defendants" (*id.* at 537).

Defendants often seek to impeach witnesses by showing that they received significant benefits in connection with participation in the Witness Protection Program.[19] The

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[18] The trial court instructed the jury, inter alia (C.A. App. 1218):

> the use of the term "criminal" in the answer [to the prosecutor's question] is not to be understood by the jury as offering any evidence whatsoever with reference to any of the Defendants in this case. It is merely a characterization the witness used in connection with whatever instructions he received in this matter.

[19] Indeed, Licavoli's attorney, during cross examination of a government witness, elicited substantial testimony concerning the witness's receipt of benefits from the government in connection

government may properly anticipate such impeachment by eliciting the fact that the witness was in the program, thus avoiding an inference that it has attempted to hide his possible bias. See *United States* v. *Thevis*, 665 F.2d 616, 637 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982); *United States* v. *Ciampaglia*, 628 F.2d 632, 639-640 (1st Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980); *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

The trial court's instruction concerning the Witness Protection Program was similar to those approved in *Partin*, 552 F.2d at 644, and *DiFrancesco*, 604 F.2d at 775. Far from constituting a "judicial vouching" for the integrity of the decision to place the witness in the program (83-1657 Pet. 10), the instruction was a carefully balanced admonition that no court had participated in the administrative decision and that the decision could not be considered in determining the question of guilt.

4. Finally, Licavoli claims (83-1657 Pet. 19-22) that the jury instructions failed adequately to distinguish between the concepts of aiding and abetting and conspiracy. As a result, he maintains, the jury could have predicated his RICO conspiracy conviction on a determination either that he aided and abetted the murder of Greene or that he participated in the conspiracy, without determining that he participated in both predicate offenses; alternatively, he suggests that the instructions could have led to a lack of juror unanimity.

Although Licavoli has not specified the portion of the charge to which his objections are directed, presumably he refers to the instruction concerning the predicate act involving conspiracy, which stated that to show that a defendant "committed the predicate act of conspiracy to

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with the Witness Protection Program (*e.g.*, Tr. 5136-5137, 5146, 5148-5149).

murder Daniel J. Greene, the government must prove * * * that such defendant planned or aided one or more defendants or co-conspirators in planning the commission of the Greene murder" (C.A. App. 563; see also *id.* at 559). That language merely advised the jury that a defendant need not have been the sole or principal architect of the conspiratorial plan in order to be found guilty of participation in the conspiracy, but could have aided in *planning* of the murder. The instruction is fully consistent with settled principles of conspiracy law and did not in any way furnish the jury with alternative grounds on which to find Licavoli guilty. See *United States* v. *Guy*, 456 F.2d 1157, 1165 & n.4 (8th Cir.), cert. denied, 409 U.S. 896 (1972).

Moreover, the court instructed the jury that, before it could convict Licavoli, it was required to find that he had committed *both* of the predicate acts charged—conspiracy to murder and the murder itself (C.A. App. 557-558). That instruction obviated any possibility that, in reaching a verdict, the jury might have found that Licavoli committed only one predicate offense or that some jurors might have based their decisions on different predicate acts than others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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